Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CARMELO JOSE RODRIGUEZ,

Petitioner,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Board of Immigration Appeals issued a final order of removal finding that Petitioner, a legal permanent resident of the United States, was deportable on the basis of his criminal convictions and that he was barred from applying for a discretionary waiver of deportation under 8 U.S.C. 1182(c) (1994) by a recent amendment to the Immigration and Nationality Act (INA). Petitioner filed a petition for review in the court of appeals seeking judicial review of the Board's ruling on the ground that the amendment did not apply retroactively to his case and that, if applicable, it would violate due process and equal protection. The court of appeals dismissed all of Petitioner's claims for lack of jurisdiction under 8 U.S.C. 1252(a)(2)(C), one of the *permanent* judicial review amendments to the INA enacted by the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). The questions presented are:

1. Whether the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) repealed the court of appeals' petition-for-review jurisdiction over Petitioner's constitutional and statutory claims regarding his eligibility to apply for a waiver of deportation under former 8 U.S.C. 1182(c) (1994), and if so, whether IIRIRA leaves open any other avenue of jurisdiction for Petitioner to obtain review of his claims?

2. If IIRIRA completely precludes review of either Petitioner's constitutional or statutory claims, does it violate the Suspension of Habeas Corpus Clause, Article III, or the Due Process Clause of the Fifth Amendment?

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PETITION FOR A WRIT OF CERTIORARI

Carmelo Jose Rodriguez respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a)[1] is reported at 206 F.3d 308 (3d Cir. 2000). The order of the court of appeals denying rehearing and rehearing *en banc* is unreported (Pet. App. 43a). The decision and order of the immigration judge (Pet. App. 37a), and the decision of the Board of Immigration Appeals (Pet. App. 40a), are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 9, 2000. Pet. App. 34a. A petition for rehearing and rehearing *en banc* was denied on June 9, 2000. Pet. App. 43a. On August 29, 2000, Justice Souter extended the time within which to file a petition for a writ of *certiorari* to and including October 7, 2000. On September 27, 2000, Justice Souter further extended the time within which to file a petition for a writ of *certiorari* to and including November 6, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Reprinted in the appendix to this petition (Pet. App. 61a-70a) are pertinent portions of the Suspension of

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[1] "Pet. App." refers to the separately bound appendix to this petition.

Habeas Corpus Clause of the Constitution, U.S. Const., Art. I, § 9, cl. 2; the Due Process Clause of the Fifth Amendment; Article III of the United States Constitution; 8 U.S.C. 1182(c), as in effect before and after April 24, 1996; 8 U.S.C. 1252(a)(1), (a)(2)(C), and (b)(9) (1999); Section 304(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C., 110 Stat. 3009-546; and 28 U.S.C. 2241.

STATEMENT

This case raises questions concerning the right of longtime legal permanent resident immigrants to obtain judicial review of a final order of removal in light of the *permanent* jurisdictional amendments to the Immigration and Nationality Act (INA) enacted by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C., 110 Stat. 3009-546. The Petitioner asserts that IIRIRA does not preclude review of his challenge to his final removal order, and that if it does preclude review of his claims, it violates the Suspension Clause, Article III and due process. The government contends that Congress has and constitutionally may dictate that *no* court may hear his challenge because of the nature of the claims. The courts of appeals are divided on the jurisdiction of the federal courts to hear the types of claims that Petitioner presents.

More specifically, the jurisdictional issue raised in this case is whether immigrants with certain criminal convictions may judicially challenge the Board of Immigration Appeals' ruling that they are statutorily ineligible to apply for a discretionary waiver of deportation. That issue raises the questions (1) whether the proper *forum* to raise this type of challenge is in the

court of appeals by means of a petition for review or in the district court by means of a habeas corpus action, and (2) whether irrespective of the forum for review, the *scope* of jurisdiction is limited to reviewing only substantial constitutional claims, so that all non-constitutional errors (including errors of statutory construction, such as the statutory retroactivity claim advanced by Petitioner in this case) are wholly unreviewable.

Petitioner's position is that review over both his statutory and constitutional claims must be available in *some* court by some means, either a district court habeas corpus action or a petition for review in the court of appeals, and that the absence of review in any court renders IIRIRA's amendments unconstitutional. The government's position is that there is no habeas jurisdiction in the district courts over the types of challenges brought by Petitioner, that the courts of appeals have exclusive jurisdiction over such challenges, and that the scope of review in the court of appeals is limited to correcting "substantial constitutional" errors.

The court of appeals in this case disagreed with the government's contentions. It held that the proper forum for review of Petitioner's claims is a district court habeas corpus action under 28 U.S.C. 2241 and that the scope of review includes both constitutional and statutory challenges to the denial of a waiver of deportation. Accordingly, the court dismissed the petition for review for lack of jurisdiction and instructed petitioner to pursue his claims in a district court habeas action. Because Petitioner's jurisdictional position is that his constitutional and statutory claims must be reviewable in some court, he does not object to the court of appeals' ruling that he must pursue his claims in district court rather than by petition for review in the court of appeals.

However, Petitioner recognizes that the circuits are divided on the jurisdictional question in this case and that the Court may decide to grant review in a habeas corpus case to resolve the circuit split. In the event the Court grants review in a habeas case, Petitioner respectfully urges the Court to grant review in this case as well to ensure that the Court will have a complete vehicle for addressing the jurisdictional questions raised by the IIRIRA amendments.

As set forth more fully below, the circuit courts have overwhelmingly agreed that the proper interpretation and constitutionality of the recent jurisdictional amendments to the INA hinge critically on the interplay between petition-for-review and habeas corpus jurisdiction and the extent to which at least one of those avenues remains available to review the types of claims that Petitioner presents. If constitutionally adequate review is available in the court of appeals by petition for review, then access to habeas review is not necessary. Similarly, if constitutionally adequate review is available in the district court, then the lack of jurisdiction in the court of appeals by petition for review is unproblematic. However, a profound constitutional issue would arise if the Court were to conclude that IIRIRA's amendments preclude both avenues of jurisdiction over either constitutional or statutory challenges. Before reaching a constitutional question of such magnitude, the Court should first determine whether IIRIRA has repealed review in *both* the district court and the court of appeals. Accordingly, *if* the Court determines that plenary review is warranted, it should grant *certiorari* in this petition-for-review case as well as in a habeas corpus case originating in the district court.

A. Introduction

IIRIRA was enacted on September 30, 1996, and substantially revised both the substantive and jurisdictional

provisions of the INA. The jurisdictional amendments of IIRIRA that are at issue here are the *permanent* provisions codified at 8 U.S.C. 1252 *et seq.*, INA § 242 *et seq.* They apply to all cases in which the administrative immigration "removal" proceedings commenced on or after April 1, 1997. IIRIRA § 309(a), 110 Stat. 3009-625.[2]

Petitioner is a longtime, lawful permanent resident of the United States who is subject to a final order of removal (formerly called an order of deportation). The Board of Immigration Appeals (BIA or Board) determined that Petitioner was deportable based on his criminal convictions and further held that a substantive amendment enacted by IIRIRA rendered him ineligible to apply for a discretionary waiver of deportation. Petitioner sought review by filing a petition for review with the court of appeals pursuant to 8 U.S.C. 1252(a)(1), which provides a general grant of jurisdiction to the courts of appeals to review challenges to final orders of removal by means of a petition for review. Petitioner did not contest the BIA's determination of deportability but challenged on statutory and constitutional grounds the BIA's determination that IIRIRA's amendments rendered him ineligible to apply for a waiver of deportation under former 8 U.S.C. 1182(c), INA § 212(c) (1994) (granting Attorney General discretionary authority to waive deportation of longtime lawful permanent residents who satisfy statutory eligibility criteria). Petitioner's principal contention is a statutory retroactivity claim—that the BIA misinterpreted the temporal reach of the substantive

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[2] As discussed more fully below, Congress in 1996 enacted two other sets of jurisdictional amendments to the INA. The first set was enacted on April 24, 1996, as part of the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214. The second was the *transitional* rules enacted by IIRIRA. *See* IIRIRA § 309(c), 110 Stat. 3009-626. Those provisions are not directly at issue but have substantially shaped the courts of appeals' interpretation of the permanent IIRIRA amendments.

amendments restricting or eliminating eligibility for Section 212(c) relief and that Congress did not intend those amendments to apply retroactively to cases where, as here, the alien's criminal conduct and conviction triggering deportation occurred before passage of the amendments.

The court of appeals dismissed the petition for review for lack of jurisdiction in light of 8 U.S.C. 1252(a)(2)(C), a provision added to the INA by IIRIRA's permanent jurisdictional amendments. That provision provides: "Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in [various sections of the INA]." The court of appeals further held that Petitioner's constitutional and statutory claims *were* reviewable in a district court habeas action under 28 U.S.C. 2241 (the general federal habeas corpus statute) because IIRIRA's amendments did not eliminate that grant of jurisdiction. The court of appeals did not reach the merits of Petitioner's statutory or constitutional claims.

The government took the position in the court of appeals that Congress has eliminated district court habeas jurisdiction over final removal orders and placed all review of such orders exclusively in the court of appeals by petition for review. The government further contended that 8 U.S.C. 1252(a)(2)(C) severely restricted the *scope* of review in the court of appeals in cases where, as here, the alien is deportable on the basis of certain criminal convictions. Specifically, the government took the position (1) that review in the court of appeals of the denial of a discretionary waiver is limited to "substantial constitutional" claims, (2) that *non*-constitutional claims challenging the denial of a waiver cannot be heard in *any* court (district court or the court of appeals), and (3) that the complete elimination of a judicial forum for Peti-

tioner's statutory retroactivity claim raises no constitutional concerns. Finally, the government argued that the particular constitutional claims asserted by Petitioner were *insubstantial* and should therefore be dismissed for lack of jurisdiction on that ground.

Petitioner took the position that review over *both* his constitutional and statutory claims remained available and that IIRIRA would violate the Constitution if it did not permit review in *some* court over both his claims. Petitioner maintained that Congress was constitutionally free to authorize review either by petition for review in the court of appeals or by habeas corpus in district court. However, Petitioner contended that in light of prior Third Circuit precedent construing the structurally similar jurisdictional amendments made by AEDPA and IIRIRA's transitional rules, the proper mechanism for review of his claims was, as a matter of statutory construction, in the district court by means of a habeas corpus action under 28 U.S.C. 2241.

The court of appeals noted that Petitioner was deportable on the basis of a criminal offense enumerated in 8 U.S.C. 1252(a)(2)(C) and held that Section 1252(a)(2)(C) repealed its own petition-for-review jurisdiction over Petitioner's statutory and constitutional claims. The court also held, however, that Petitioner could bring his claims in a district court habeas action because no provision of IIRIRA expressly repealed 28 U.S.C. 2241. The court further held that the scope of review in a Section 2241 habeas action included both constitutional and statutory claims. Accordingly, it dismissed the petition for review and instructed Petitioner to pursue his constitutional and statutory claims in a district court habeas action (which Petitioner had already filed).[3]

[3] Mr. Rodriguez's habeas action is now before the Third Circuit on appeal of the district court's ruling in favor of the government on the *merits*.

Because the court of appeals found that the district court remained available to review Petitioner's constitutional and statutory claims, it held that the elimination of its own jurisdiction over petitions for review did not raise the "serious constitutional problems" that would have been triggered had no forum been available to raise pure questions of constitutional and statutory law challenging the denial of a waiver of deportation. Pet. App. 28a. The court stressed that absent an alternative avenue of review, it could not have dismissed the petition for review without first addressing whether Petitioner's constitutional or statutory claims could be completely insulated from judicial review in any court by any means. *Id.*

The government sought rehearing and rehearing *en banc*, requesting that the court of appeals hold that habeas jurisdiction was unavailable to challenge a final order of removal, that the courts of appeals retained jurisdiction over substantial constitutional claims (but no other claims), and that Petitioner had presented no substantial constitutional claims. The government thus agreed with the result reached in the original decision (dismissal of all of Petitioner's claims), but not the grounds for dismissal. The court of appeals denied rehearing, leaving Petitioner without review in the court of appeals but with habeas jurisdiction as an alternative forum to pursue both his constitutional and statutory claims.

Because the court of appeals preserved habeas jurisdiction over Petitioner's constitutional and statutory claims, he does not object to the dismissal of his petition for review. However, *if* the Court concludes that review is warranted to resolve the circuit conflict on the availability of habeas review over challenges such as Petitioner's, he respectfully urges the Court to grant *certiorari* in both this "petition for review" case and in a habeas

case originating in district court to insure that the Court is presented with the complete procedural vehicle for resolving the jurisdictional issue.

As the court of appeals properly recognized, the interpretation and constitutionality of IIRIRA's amendments turn on whether the courts of appeals' own jurisdiction has been repealed, and if so, the extent to which some other mechanism (such as habeas corpus review) remains available to review claims such as Petitioner's. If no forum is available, then this Court would have to reach the constitutional questions raised by a complete preclusion of review over Petitioner's statutory or constitutional claims. That constitutional question has far-reaching implications and should be confronted only if this Court determines that IIRIRA's jurisdictional amendments have eliminated review *both* in the courts of appeals by petition for review and in the district courts by habeas corpus. Granting review in both a habeas action and a petition for review case will provide the Court with the necessary vehicle to make that determination.

In addition, if the Court concludes that plenary review is warranted, Petitioner respectfully suggests that the petition for review in this case is a particularly appropriate vehicle to address the disagreement among the circuits for several reasons. First, Petitioner is challenging whether the BIA erred in holding that IIRIRA repealed his eligibility to apply for a waiver of deportation. This case does *not* challenge the BIA's threshold finding of deportability. The distinction between those two types of challenges is critical because there is no circuit split over the courts' jurisdiction to hear challenges to whether the BIA properly found an alien deportable in cases governed by Section 1252(a)(2)(C). The courts of appeals have held that the statute does not affect their petition-for-review jurisdiction over such a challenge to

hear both constitutional and non-constitutional claims (and the government agrees).

Second, Petitioner in this case raised both a constitutional *and* a statutory challenge to the BIA's finding that he was ineligible for a waiver of deportation. Accordingly, this case squarely presents the Court with a vehicle for resolving whether aliens with certain criminal convictions may raise only "substantial constitutional" claims challenging the denial of a waiver of deportation (as the government contends) or may also raise pure questions of statutory law.[4]

B. Statutory Framework

The jurisdictional issue presented by this case initially arose under two prior sets of amendments to the INA. The first set was enacted by AEDPA and went into effect on April 24, 1996; the second involved the "transitional" judicial review rules of IIRIRA. The decisions from the courts of appeals construing those prior jurisdictional amendments have had a significant impact on the manner in which the circuits have interpreted the permanent jurisdictional amendments at issue here.

1. *AEDPA and IIRIRA's Transitional Amendments*

Historically, deportation orders were reviewable in district court, primarily through habeas corpus, and for a brief period, through both habeas and APA declaratory actions. *See Shaughnessy v. Pedreiro*, 349 U.S. 48, 52 (1955). In 1961, Congress amended the INA and created

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[4] Moreover, the specific statutory claim raised by Petitioner in this case—whether the substantive IIRIRA amendments *retroactively* repealed eligibility for Section 212(c) waivers of deportation for aliens with aggravated felony convictions—is the statutory question that is affecting the greatest number of aliens and generating the most jurisdictional confusion.

a new judicial review scheme, formerly codified at 8 U.S.C. 1105a *et seq.* (1994), INA § 106 *et seq.*

The 1961 amendments gave the courts of appeals "sole and exclusive" jurisdiction to review final deportation orders by means of a petition for review. *See* former 8 U.S.C. 1105a(a) (1994), INA § 106(a); *Foti v. INS*, 375 U.S. 217, 221 (1963). The 1961 amendments also added a specific provision to the INA, however, which expressly provided for habeas review of deportation orders, although there was confusion regarding precisely when aliens could invoke such jurisdiction given that the INA simultaneously vested the courts of appeals with "sole and exclusive" jurisdiction over final deportation orders. *See, e.g., Nakaranurack v. INS*, 68 F.3d 290, 293 (9th Cir. 1995); *United States ex rel. Marcello v. INS*, 634 F.2d. 964, 969 (5th Cir. 1981).

AEDPA was enacted on April 24, 1996, and contained two relevant changes to the judicial review scheme created in 1961.[5] First, in Subtitle A of Title IV, AEDPA § 401(e) repealed the specific habeas provision in 8 U.S.C. 1105a(a)(10). 110 Stat. 1268. Second, in Subtitle B, AEDPA § 440(a) amended former 8 U.S.C. 1105a(a)(10) to provide that a final order of deportation entered against immigrants deportable on the basis of certain enumerated criminal grounds "shall not be subject to review by any court." 110 Stat. 1276-1277. AEDPA's amendments did not mention 28 U.S.C. 2241.

IIRIRA became law four months later and enacted additional changes to judicial review, including both transitional and permanent jurisdictional rules. The transitional rules applied to immigration proceedings commenced before April 1, 1997, in which the deportation

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[5] AEDPA's jurisdictional provisions went into effect immediately and applied to all pending cases. *Salazar-Haro v. INS*, 95 F.3d 309, 311 (3d Cir. 1996).

order became final on or after October 31, 1996. IIRIRA § 309(a). Like AEDPA, IIRIRA's transitional amendments contained a provision that restricted review in cases involving aliens deportable on the basis of certain criminal offenses. That provision, IIRIRA § 309(c)(4)(G), provided that "there shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having committed a criminal offense covered in [enumerated INA sections]." 110 Stat. 3009-626. IIRIRA's transitional rules, like AEDPA's amendments, did not mention Section 2241 habeas jurisdiction.

In light of the AEDPA/IIRIRA transitional amendments, two basic jurisdictional questions arose. The first was whether the jurisdictional bars in AEDPA § 440(a) and IIRIRA § 309(c)(4)(G) barred review in the courts of appeals where aliens contended that they were not deportable on the basis of one of the criminal offenses enumerated in those provisions. On that question, no significant disagreement emerged. The courts reasoned (and the government agreed) that the jurisdictional bar in AEDPA § 440(a) and IIRIRA § 309(c)(4)(G) is triggered, by its terms, only where the alien "*is* deportable" (emphasis added), and not where the BIA deems the alien deportable on the basis of one of the enumerated offenses. *Yang v. INS*, 109 F.3d 1185, 1192 (7th Cir. 1997). Accordingly, the courts of appeals held that they did not lose jurisdiction until *they* determined that the alien was deportable on the basis of one of the enumerated offenses, *i.e.*, they had "jurisdiction to determine their own jurisdiction." *Lettman v. INS*, 168 F.3d 463, 465 (11th Cir. 1999). *See also Hall v. INS*, 167 F.3d 852, 855 (4th Cir. 1999); *Okoro v. INS*, 125 F.3d 920, 925 n.10 (5th Cir. 1997). ***But see Berehe v. INS***, 114 F.3d 159, 161-62 (10th Cir. 1997).

The second jurisdictional question that arose under AEDPA and IIRIRA's transitional rules produced substantial litigation, and ultimately a 10-1 division in the courts of appeals. That question was whether aliens who were deportable on the basis of a criminal offense enumerated in AEDPA § 440(a) or IIRIRA § 309(c)(4)(G) could obtain judicial review of the BIA's determination that they were statutorily ineligible to apply for a waiver of deportation.

The courts of appeals overwhelmingly held that the proper forum to challenge a denial of a waiver of deportation was in a district court habeas action and that the scope of review included, at a minimum, constitutional and statutory claims. *Goncalves v. Reno*, 144 F.3d 110 (1st Cir. 1998), *cert. denied*, 526 U.S. 1004 (1999); *Henderson v. INS*, 157 F.3d 106 (2d Cir. 1998), *cert. denied sub nom. Reno v. Navas*, 526 U.S. 1004 (1999); *Sandoval v. Reno*, 166 F.3d 225 (3d Cir. 1999); *Bowrin v. INS*, 194 F.3d 483 (4th Cir. 1999); *Requena-Rodriguez v. Pasquarell*, 190 F.3d 299 (5th Cir. 1999); *Pak v. Reno*, 196 F.3d 666 (6th Cir. 1999); *Shah v. Reno*, 184 F.3d 719 (8th Cir. 1999); *Magana-Pizano v. INS*, 200 F.3d 603 (9th Cir. 1999) ("*Magana II*"); *Jurado-Gutierrez v. Greene*, 190 F.3d 1135 (10th Cir. 1999); *Mayers v. INS*, 175 F.3d 1289 (11th Cir. 1999).

These courts concluded that the jurisdictional bars repealed their own petition-for-review jurisdiction over challenges to the denial of a waiver of deportation, including to review substantial constitutional claims, but held that nothing in AEDPA or IIRIRA's transitional rules precluded district court habeas jurisdiction over such challenges under 28 U.S.C. 2241. Applying this Court's decision in *Felker v. Turpin*, 518 U.S. 651, 660-61 (1996), which declined to find a repeal "by implication" of the Court's original habeas jurisdiction under Section 2241, the circuits held that the absence of an

express statement repealing Section 2241 meant that such jurisdiction remained available to review certain aspects of a deportation order that could not be challenged by a petition for review. The courts of appeals further held that the scope of habeas review was not limited to reviewing substantial constitutional claims but included review of at least certain non-constitutional *legal* claims (such as pure questions of statutory interpretation) because historically non-constitutional legal claims were reviewable in immigration habeas actions and the plain terms of Section 2241 authorized jurisdiction over violations of the "Constitution or treaties or *laws* of the United States." *See* Section 2241(c)(3) (emphasis added); *see also* Section 2241(c)(1).[6]

The government sought review in this Court regarding the proper forum and scope of judicial review to challenge the denial of a waiver of deportation in the first three decisions adverse to its jurisdictional position (the First Circuit's decision in *Goncalves*; the Second Circuit's decision in *Henderson/Navas*; and the Ninth Circuit's decision in *Magana-Pizano v. INS*, 152 F.3d 1213 (9th Cir 1998)). The Court denied the petitions in *Goncalves* and *Henderson/Navas*, and remanded the

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[6] The lone dissenting Circuit was the Seventh, but even it disagreed only in part with the majority approach. *LaGuerre v. Reno*, 164 F.3d 1035 (7th Cir. 1998), *cert. denied*, 120 S. Ct. 1157 (2000). *LaGuerre* held that habeas jurisdiction was not available to challenge a final deportation order and that all review must be sought in the court of appeals by means of a petition for review. However, *LaGuerre* expressed skepticism (but ultimately did not rule) on the government's position that the *scope* of review was limited to constitutional challenges and that Congress had intended to foreclose all review of statutory claims challenging the denial of a waiver of deportation, including the statutory retroactivity claim at issue in that case: "It seems unlikely that Congress would have wanted the Board to have the final word on so pure and fundamental a question of law as when the statute went into effect." 164 F.3d at 1041.

Ninth Circuit's decision in *Magana-Pizano* for further consideration in light of the Court's intervening decision in *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999) (*AADC*). *See Reno v. Goncalves*, 526 U.S. 1004 (1999) (denying *certiorari*); *Reno v. Navas*, 526 U.S. 1004 (1999) (same); *INS v. Magana-Pizano*, 526 U.S. 1001 (1999), *vacating*, 152 F.3d 1213 (9th Cir. 1998).[7]

2. *IIRIRA's Permanent Jurisdictional Amendments*

The permanent IIRIRA amendments repealed the prior judicial review scheme (*i.e.*, the 1961 scheme as amended by AEDPA and IIRIRA's transitional rules) and substituted a new statute, codified at 8 U.S.C. 1252 *et seq.*, INA § 242 *et seq.* Although the relevant permanent amendments are worded differently, the basic structure of the new provisions is the same. IIRIRA contains provisions vesting the courts of appeals with sole jurisdiction to review removal orders by petition for review (*see* 8 U.S.C. 1252(a)(1); 1252(b)(9)) and, as noted, includes a provision restricting review for aliens removable on the basis of specified criminal offenses, codified at 8 U.S.C. 1252(a)(2)(C). Like the prior sets of amendments, the permanent IIRIRA amendments also do not mention Section 2241 habeas jurisdiction.

As with the prior amendments, two jurisdictional issues have arisen, *i.e.*, the availability of judicial review

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[7] Unlike the decisions in the other circuits, the Ninth Circuit rested its decision on constitutional grounds because it found that Section 2241 had been repealed by one of IIRIRA's provisions, 8 U.S.C. 1252(g). The reach of that provision was significantly narrowed in *AADC*, 525 U.S. at 482, and on remand the Ninth Circuit joined nine other circuits in concluding that the amendments made by AEDPA and IIRIRA's transitional provisions did not repeal Section 2241, thereby obviating the need for a constitutional ruling. *Magana-Pizano v. INS*, 200 F.3d 603 (9th Cir. 1999) (*Magana-Pizano II*).

over challenges to the initial finding of deportability and the availability of judicial review over challenges to the denial of a waiver of deportation. With respect to both questions, the government has taken the same position it ultimately advanced under the amendments made by AEDPA and IIRIRA's transitional provisions.

Thus, on the first question—whether aliens may obtain judicial review to contest the threshold finding of deportability—the government has maintained that the courts of appeals retain jurisdiction to determine their own jurisdiction and to decide constitutional and non-constitutional claims challenging whether the alien "*is* removable" on the basis of a criminal offense enumerated in the criminal bar provision in Section 1252(a)(2)(C) (emphasis added). And, as with the prior amendments, the circuits have agreed that they may review constitutional and non-constitutional claims challenging whether the alien is removable on the basis of an offense enumerated in Section 1252(a)(2)(C). *See, e.g., Bell v. Reno*, 218 F.3d 86 (2d Cir. 2000); *Aragon-Ayon v. INS*, 206 F.3d 847 (9th Cir. 2000).

On the second question—the availability of judicial review over challenges to the denial of a waiver of deportation—the courts of appeals are divided. Four circuits, including the court of appeals below, have held that aliens may not challenge the denial of a waiver in the court of appeals by means of a petition for review, but may bring both constitutional and statutory challenges to the denial of a waiver in a Section 2241 habeas action in district court. *See Pet. App. 20a-21a* (opinion below); *Mahadeo v. Reno*, 226 F.3d 3, 13 (1st Cir. 2000); *Calcano-Martinez v. INS*, 2000 WL 1336611 (2d Cir. Sept. 1, 2000); *Flores-Miramontes v. INS*, 212 F.3d 1133, 1137 (9th Cir. 2000).

Three Circuits (the Fifth, Seventh and Eleventh) have accepted the government's position that there is no longer any habeas jurisdiction over final orders and have held that any review that remains for aliens removable on the basis of a criminal conviction enumerated in Section 1252(a)(2)(C) must be sought in the court of appeals by a petition for review. These courts have acknowledged that the permanent rules, like the prior amendments, nowhere mention Section 2241, but have concluded that the language and overall structure of the permanent amendments are sufficient to repeal habeas jurisdiction. *Max-George v. Reno*, 205 F.3d 194, 198 (5th Cir. 2000); *Morales-Ramirez v. Reno*, 209 F.3d 977, 980 (7th Cir. 2000); *Richardson v. Reno*, 180 F.3d 1311, 1315 (11th Cir. 1999) (*Richardson II*), *cert. denied*, 120 S.Ct. 1529 (2000). These courts have not, however, squarely ruled on the government's contention that the courts of appeals' petition-for-review jurisdiction is restricted to reviewing substantial constitutional claims challenging the denial of a waiver of deportation.

C. Petitioner's Administrative Immigration Proceedings

Petitioner, Jose Carmelo Rodriguez, has resided in the United States for more than 15 years. He entered the United States on December 20, 1983, as a lawful permanent resident of the United States and has resided continuously and lawfully in the United States since that time. He is married to a United States citizen and the couple have two United States citizen children, aged ten and seven. His parents and his three siblings are also United States citizens. Pet. App. 47-48a.

In February 1993, Petitioner pled guilty in New Jersey state court to two counts of receiving stolen property in the third degree and one count of possession of a controlled, dangerous substance (cocaine) in the third

degree. He was sentenced to four years imprisonment but was released after he served approximately fifteen months. In March 1994, he pled guilty in Ohio state court to receiving stolen property and received a six-month sentence. In November 1995, Petitioner pled guilty in New Jersey state court to one count of receiving stolen property and served approximately two years of a five year sentence. Pet. App. 7a.

Based on his criminal convictions, the Immigration and Naturalization Service (INS) instituted removal proceedings against Petitioner in July 1997. Petitioner conceded that his criminal convictions rendered him deportable under 8 U.S.C. 1227(a)(2)(A)(ii) (two crimes of moral turpitude), 1227(a)(2)(A)(iii) (aggravated felony), and 1227(a)(2)(B)(i) (controlled substance offense), but sought to apply for a waiver of deportation under, *inter alia*, former 8 U.S.C. 1182(c), INA § 212(c). That provision authorized the Attorney General (or her delegates, immigration judges and the BIA) to waive deportation for longtime lawful permanent residents who satisfied the statutory eligibility criteria. According to Department of Justice Statistics, more than one-half of all applications for Section 212(c) relief were granted between 1989-1994. *See Goncalves*, *supra*, 144 F.3d at 128 (citing DOJ statistics).[8]

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[8] Prior to 1996, at the time Petitioner pled guilty to his criminal convictions, lawful permanent residents were statutorily eligible to apply for a Section 212(c) waiver if they had a lawful unrelinquished domicile in this country for seven years, and, if convicted of an "aggravated felony" (as defined in the INA, 8 U.S.C. 1101(a)(43) (1994)), had not served a term of imprisonment for that conviction of five years or longer. 8 U.S.C. 1182(c). *See Matter of Silva*, 16 I. & N. Dec. 26 (BIA 1976). The request for Section 212(c) relief was adjudicated by an immigration judge as part of the deportation process and an order of deportation was not entered until the Section 212(c) application was adjudicated.

In December 1997, an immigration judge determined that Petitioner was statutorily ineligible for Section 212(c) relief, denied the request for a waiver as a matter of law, and ordered him removed from the United States. Pet. App. 37a. The BIA affirmed on December 29, 1998, agreeing that Petitioner was statutorily ineligible to apply for Section 212(c) relief from deportation in light of the amendments made to the INA's waiver provisions by IIRIRA. Pet. App. 40a.

The BIA's decision was based on IIRIRA § 304(b), 110 Stat. 3009-597, one of the permanent IIRIRA substantive amendments. Pet. App. 42a. In light of IIRIRA § 304(b), which repealed 8 U.S.C. 1182(c), INA § 212(c), as of April 1, 1997 (IIRIRA's general effective date), the BIA reasoned that a waiver under former Section 212(c) was "not a form of relief that is available" to aliens, like Petitioner, whose immigration proceedings commenced on or after April 1, 1997. The BIA rejected Petitioner's contention that the repeal of the former Section 212(c) waiver provision did not apply retroactively to cases where, as here, the alien had been statutorily eligible to apply for Section 212(c) relief and had pled guilty to the criminal offense triggering deportation prior to passage of the 1996 amendments. (The Second Circuit is the only court of appeals that has squarely addressed the merits of Petitioner's statutory retroactivity claim regarding his eligibility for a Section 212(c) waiver. It rejected the BIA's interpretation and held that aliens with pre-AEDPA/IIRIRA pleas remain eligible to apply for Section 212(c) relief. *See St. Cyr v. INS*, 2000 WL 1234850, *11, *12 (2d Cir. Sept. 1, 2000)).[9]

[9] The Second Circuit reasoned, *inter alia*, that aliens may have chosen to accept a plea (often on the advice of defense counsel) on the understanding that it would preserve their eligibility for Section 212(c) relief and that to deny them the opportunity to apply for relief

D. Decision of the Court of Appeals

Petitioner sought judicial review of the BIA's ruling that he is statutorily ineligible to apply for Section 212(c) relief on two main grounds. The first is the statutory claim accepted by the Second Circuit in *St. Cyr*: that the repeal of the INA's former Section 212(c) provision does not apply retroactively to cases where the alien entered into a pre-AEDPA/IIRIRA plea agreement that left him statutorily eligible to apply for Section 212(c) relief at that time. The second is a constitutional claim: that the retroactive repeal of Section 212(c) relief for aliens with pre-Act pleas would be arbitrary and irrational in violation of due process and equal protection. Because of the jurisdictional controversy surrounding the 1996 amendments, Petitioner filed both a petition for review directly in the Third Circuit (which is the subject of this petition) and a district court habeas corpus action (which remains pending on appeal before the Third Circuit).

The court of appeals issued its decision on March 9, 2000.[10] The court of appeals recognized that Petitioner was challenging only whether he was improperly denied the right to apply for a waiver of deportation under former Section 212(c) and was not contesting the BIA's threshold determination that he was deportable on the

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under these circumstances would have an impermissible retroactive effect. *St. Cyr*, 2000 WL 1234850, at *12.

Several circuits have ruled for aliens on similar retroactivity grounds in cases falling under AEDPA's restrictions on the availability of Section 212(c) waivers. *See Magana-Pizano v. INS*, 200 F.3d 603, 611 (9th Cir. 1999); *Tasios v. INS*, 204 F.3d 544, 552 (4th Cir. 2000); *Mattis v. INS*, 212 F.3d 31, 33 (1st Cir. 2000).

[10] The court of appeals consolidated Petitioner's case with two other cases (*Liang v. INS* and *Cinquemani v. INS*). The aliens in those two cases were not represented by counsel for Petitioner and have apparently not sought review in this Court.

basis of one of the criminal offenses enumerated in the jurisdictional bar in 8 U.S.C. 1252(a)(2)(C). In light of the jurisdictional bar in Section 1252(a)(2)(C), the court of appeals held that it could not entertain Petitioner's constitutional or statutory claims challenging the denial of a Section 212(c) waiver because Section 1252(a)(2)(C) repealed the court's petition-for-review jurisdiction over such challenges. The court rejected the government's argument that it should carve out an exception for substantial constitutional claims. The court stated that it was unnecessary for it to create exceptions to the jurisdictional bar for constitutional claims (or any other type of claim) because the permanent rules left open an alternative avenue of review for constitutional and statutory claims challenging the denial of a waiver, namely a district court habeas action under Section 2241. By finding that habeas jurisdiction existed, the court avoided the "serious constitutional problems" that would have been triggered by a complete preclusion of review over Petitioner's constitutional or statutory claims. Pet. App. 28a.

The court of appeals' conclusion that Section 2241 habeas review remained available was based on its prior decision in *Sandoval v. Reno*, 166 F.3d 225 (3d Cir. 1999), which interpreted the jurisdictional provisions of AEDPA and IIRIRA's transitional rules. The court of appeals noted that, under *Sandoval*, Section 2241 could only be repealed by an express directive. Accordingly, the court stated that the precise question in this case was whether the permanent rules are more specific with respect to Section 2241 than the transitional rules:

> The difficulty with the government's effort to convince us that the language . . . of any of the permanent rules requires a different result than that reached in *Sandoval* is that no language in the permanent rules fills the gap we found in *Sandoval*.

> None of the provisions, including INA § 242(b)(9) [8 U.S.C. 1252(b)(9)], expressly refers to habeas jurisdiction or to 28 U.S.C. § 2241. None expressly revokes habeas jurisdiction.

Pet. App. 20a.

The court of appeals thus concluded that Section 2241 jurisdiction remained available and instructed Petitioner to pursue his claims in his habeas action, which was then pending in the district court. On June 9, 2000, the court of appeals denied the government's petition for rehearing and rehearing *en banc*.

In light of the court of appeals' decision, the district court ruled that it had Section 2241 habeas jurisdiction over Petitioner's constitutional and statutory claims but ruled for the government on the merits. Pet. App. 57a. Petitioner has appealed that merits ruling, and the case is currently before the Third Circuit awaiting a briefing schedule. *Rodriguez v. Reno*, No. 00-2225 (3d Cir.).

REASONS FOR GRANTING THE WRIT

Petitioner's jurisdictional position is that his constitutional and statutory claims challenging the BIA's finding that he is statutorily ineligible to apply for a Section 212(c) waiver of deportation must be available in *some* court—either a district court habeas action or a petition for review in the court of appeals. Because the court of appeals in this case held that Petitioner's constitutional and statutory claims were reviewable in a district court habeas action under 28 U.S.C. 2241, Petitioner does not object to the court's conclusion that it lacked jurisdiction to review his claims by a petition for review. Petitioner recognizes, however, that the circuits are currently divided on the availability of habeas review over challenges to the denial of a waiver of deporta-

tion,[11] and that this conflict may give the Court reason to grant review on this jurisdictional issue. If the Court does conclude that review is warranted, Petitioner respectfully urges the Court to grant the instant petition for the following reasons.

First, and most importantly, if the Court decides to consider the jurisdictional issue, it should grant review in both a petition for review case and a case arising from a district court habeas action, thereby ensuring that it has a comprehensive vehicle to address the issues in this case. As the courts of appeals have properly recognized, including the Third Circuit in this case, the interpretation and constitutionality of the IIRIRA amendments depend upon the extent to which *some* forum remains available to review claims such as Petitioner's. *See* Pet. App. 10a (opinion below) ("determination of our jurisdiction over the petitions for review is inextricably intertwined with the question whether the district courts have continued habeas jurisdiction"); *Mahadeo v. Reno*, 226 F.3d 3 (1st Cir. 2000); *Calcano-Martinez v. INS*, 2000 WL 1336611 (2d Cir. Sept. 1, 2000). Moreover, the instant petition for review case is an especially appropriate vehicle because Mr. Rodriguez filed both a petition for review and a district court habeas action, and the court of appeals addressed both avenues of review in a comprehensive opinion.

Second, Petitioner is challenging the denial of a waiver of deportation, and not the BIA's threshold finding that he is deportable. As noted, that distinction is

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[11] *Compare* Pet. App. 1a (opinion below); *Mahadeo v. Reno*, 226 F.3d 3 (1st Cir. 2000); *Calcano-Martinez v. INS*, 2000 WL 1336611 (2d Cir. Sept. 1, 2000); *Flores-Miramontes v. INS*, 212 F.3d 1133 (9th Cir. 2000); *with Richardson v. Reno*, 180 F.3d 1311 (11th Cir. 1999); *Max-George v. Reno*, 205 F.3d 194 (5th Cir. 2000); *Morales-Ramirez v. Reno*, 209 F.3d 977 (7th Cir. 2000).

fundamental because there is no disagreement among the circuits on the availability of jurisdiction to challenge whether the BIA properly found an alien deportable on the basis of one of the criminal offenses triggering IIRIRA's jurisdictional bar. The circuits have overwhelmingly agreed (as does the government) that such a challenge may be brought in the court of appeals and is not limited to correcting only constitutional errors. The jurisdictional conflict has arisen solely with regard to the proper forum and scope of review over challenges to the denial of a *waiver of deportation* once the alien has been determined to be deportable.

Third, and critically, Petitioner has sought review of both constitutional and statutory claims. Accordingly, this case presents both the issue of the proper forum for review (district court or court of appeals), as well as the recurring issue regarding the scope of review for aliens with criminal convictions, and specifically, whether aliens with certain criminal convictions may be limited to raising only "substantial constitutional" claims challenging the denial of a waiver of deportation. Moreover, the particular statutory claim raised by Petitioner in this case, whether the permanent IIRIRA amendments *retroactively* repealed eligibility for Section 212(c) waivers of deportation, is the statutory issue that has given rise to the most jurisdictional confusion.

CONCLUSION

For the foregoing reasons, the Court should grant this petition if it grants review in a habeas corpus case to resolve the jurisdictional issues raised in this case.

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No. 00-____

IN THE

Supreme Court of the United States

CARMELO JOSE RODRIGUEZ,

Petitioner,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Appendix A

Filed March 9, 2000

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-5053

XU CHENG LIANG,

Petitioner

—v.—

IMMIGRATION & NATURALIZATION SERVICE,

Respondent

Petition for Review of a Decision of the
Immigration & Naturalization Service
(A40 278 218)

No. 99-5327

GIOACCHINO CINQUEMANI,

Petitioner

—v.—

IMMIGRATION & NATURALIZATION SERVICE,

Respondent

Petition for Review of a Decision of the
Immigration & Naturalization Service
(A35 098 342)

No. 99-6039

CARMELO JOSE RODRIGUEZ,

Petitioner

—v.—

IMMIGRATION & NATURALIZATION SERVICE,

Respondent

Petition for Review of a Decision of
the Immigration & Naturalization Service
(A38 502 331)

Argued December 20, 1999

Before:

SLOVITER, ROTH and COWEN, *Circuit Judges*

(Filed March 9, 2000)

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OPINION OF THE COURT

SLOVITER, *Circuit Judge*.

I.

INTRODUCTION

In several opinions handed down in the last two years, this court has had occasion to consider the effect of various provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996), and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009-546

(1996), on the jurisdiction of the federal courts over issues raised by aliens with respect to deportation proceedings commenced by the Immigration and Naturalization Service ("INS"). Judicial review of cases in which the INS commenced deportation proceedings against the alien prior to April 1, 1997 is governed by the transitional rules of IIRIRA, whereas judicial review of those commenced thereafter are governed by the permanent judicial review amendments of IIRIRA ("permanent rules").

The three cases before us today arise under the permanent rules, which we have not previously interpreted. In particular, they require us to decide whether this court has jurisdiction over a petition for review filed by an alien who has been ordered deported because s/he has been convicted of one or more crimes specified in the Immigration and Nationality Act ("INA") (hereafter referred to as an alien with a criminal conviction).[1] As a necessary component of that decision we must also decide whether the permanent judicial review amendments of IIRIRA divest the federal courts of their habeas corpus jurisdiction under 28 U.S.C. § 2241.

In our earlier decisions, we held that AEDPA and the transitional rules of IIRIRA deprived us of jurisdiction over a petition for review from a final order of removal entered against an alien convicted of certain crimes listed in the statutes, *see Catney v. INS*, 178 F.3d 190 (3d Cir. 1999); *Morel v. INS*, 144 F.3d 248 (3d Cir. 1998), but that the district courts retain jurisdiction under the

[1] We use the term "alien with a criminal conviction" to refer to an alien who has been convicted of one or more crimes listed in INA § 242(a)(2)(C), AEDPA § 440(a), or transitional rule IIRIRA § 309(c)(4)(G). The covered crimes include aggravated felonies, controlled substance convictions, certain firearm offenses, miscellaneous national security or defense crimes, or two convictions for crimes involving moral turpitude.

general statutory grant of habeas corpus jurisdiction, 28 U.S.C. § 2241, to review statutory and constitutional challenges to the deportation order, *see Sandoval v. Reno*, 166 F.3d 225 (3d Cir. 1999); *DeSousa v. Reno*, 190 F.3d 175 (3d Cir. 1999).

In the cases currently before us, three permanent legal residents, Gioacchino Cinquemani, Carmelo Jose Rodriguez, and Xu Cheng Liang (collectively "petitioners"), have filed petitions for review challenging the final orders of removal entered against them by the Board of Immigration Appeals ("BIA"). Rodriguez has also filed a petition for a writ of habeas corpus in the district court of New Jersey, *Rodriguez v. Reno*, Civ. No. 99-4300, which is pending. The INS filed a motion to dismiss for lack of jurisdiction in each case before us. We directed that petitioners' cases be expedited and consolidated.[2] The American Civil Liberties Union ("ACLU") filed an amicus brief on the jurisdictional issues, as did a group of twenty-six law professors. The Citizens and Immigrants for Equal Justice filed an amicus brief on the merits of petitioners' claims. We focus on the jurisdictional issue, as we cannot consider the merits of the petitioners' claims until that is resolved.

II.

BACKGROUND

Gioacchino Cinquemani, a native and citizen of Italy, entered the United States as a lawful permanent resident in 1975. He is married and has two United States citizen children. He pled guilty on December 4, 1997 in the

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[2] A fourth case also consolidated with them arose under the transitional rules and was dismissed for lack of jurisdiction. *Vergara-Hernandez v. INS*, 205 F.3d 1331, No. 98-3175 (3d Cir. Dec. 27, 1999) (unpublished memorandum opinion).

United States District Court for the Eastern District of New York to conspiracy to engage in the business of dealing in firearms in violation of 18 U.S.C. § 371 and conspiracy to distribute and possess with intent to distribute heroin and morphine in violation of 21 U.S.C. §§ 846 and 841(b)(1)(B), conduct which took place in 1994 and for which he was arrested in 1994. In March 1998, the INS issued an order to show cause why Cinquemani should not be deported based on the convictions.

Carmelo Jose Rodriguez, a native and citizen of the Dominican Republic, entered the United States as a lawful permanent resident in 1983. He also is married and has two United States citizen children. He pled guilty in 1993 in New Jersey state court to two counts of receiving stolen property and to one count of possession of cocaine, pled guilty in 1994 in Ohio state court to receiving stolen property, and pled guilty in 1995 in New Jersey state court to one count of receiving stolen property. He was released from prison for the latter crime on March 5, 1997. On July 1, 1997, the INS initiated removal proceedings against Rodriguez on the basis of his criminal convictions.

Xu Cheng Liang, a native and citizen of China, entered the United States as a lawful permanent resident in 1987. He also has two United States citizen children. He was allegedly convicted in 1989 in New York state court of attempted robbery in the second degree and in May 1997 in federal court of conspiracy to distribute heroin and of possession with intent to distribute heroin in violation of 21 U.S.C. § 846. On February 3, 1998, the INS instituted removal proceedings against Liang on the basis of his convictions.

At their immigration hearings, both Cinquemani and Rodriguez conceded that they were removable aliens based on their criminal convictions, but argued that they

should be permitted to seek waiver of deportability under former INA § 212(c). Rodriguez also requested the discretionary relief of cancellation of removal under new INA § 240A, 8 U.S.C. § 1229b, and adjustment of status in conjunction with waiver of inadmissibility under INA § 212(h), 8 U.S.C. § 1182(h). At his immigration hearing, Liang denied the alleged convictions. The Immigration Judge found the government had not met its burden of showing that Liang had been convicted in 1989, but found that it had met its burden as to the 1997 conviction, which still qualified Liang as an aggravated felon subject to removal. Liang then sought discretionary relief under former INA § 212(c).

Under former § 212(c), codified at 8 U.S.C. § 1182(c), the Attorney General or her delegates, such as the BIA, had discretionary authority to waive the deportation of a deportable alien because of extraordinary hardship to the deportee or his family, or other exceptional circumstances.[3] Although the statutory provision itself referred only to aliens in exclusion proceedings, it had been interpreted also to apply to aliens in deportation proceedings. *See Katsis v. INS*, 997 F.2d 1067, 1070 (3d Cir. 1993); *Francis v. INS*, 532 F.2d 268, 273 (2d Cir. 1976).[4]

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[3] Section 212(c) provided, in pertinent part:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General [despite being otherwise excludable] . . . . The first sentence of this subsection shall not apply to [an] alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years.

8 U.S.C. § 1182(c) (1994) (repealed 1996).

[4] IIRIRA eliminated any statutory distinctions between deportable and excludable aliens. Prior to IIRIRA, deportable aliens

In 1996, § 212(c) was amended by § 440(d) of AEDPA to preclude deportable aliens who had been convicted of an aggravated felony or two crimes of moral turpitude from receiving waivers, regardless of the prison term served for such crimes. *See DeSousa v. Reno*, 190 F.3d 175 (3d Cir. 1999) (rejecting equal protection challenge to AEDPA § 440(d) because of the distinction made between deportable and excludable aliens).

When, effective April 1, 1997, INA § 212(c) was repealed in its entirety by § 304(b) of IIRIRA, it was replaced with another discretionary relief provision, INA § 240A. *See* IIRIRA § 304(a) (adding new INA § 240A, codified at 8 U.S.C. § 1229b). That section permits the Attorney General or her delegates in her discretion to cancel removal in certain circumstances, but not when the alien has been convicted of an aggravated felony as defined by the INA, making each of the petitioners ineligible for relief under that section. As a result of these statutory changes the BIA affirmed the decisions of the Immigration Judges that the petitioners were ineligible for relief under former § 212(c).

Petitioners, relying on the principles set forth in *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S.Ct. 1483, 511 U.S. 244 (1994), and elaborated in *Lindh v. Murphy*, 521 U.S. 320, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997), and *Martin v. Hadix*, 527 U.S. 343, 119 S.Ct. 1998, 144 L.Ed.2d 347 (1999), argue that the BIA erred by interpreting IIRIRA § 304(b) to apply retroactively to criminal conduct and convictions that occurred before the effective date of the section. Thus, petitioners are challenging the BIA's legal interpretation of the statute as depriving it of discretion rather than the exercise of any

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were defined in 8 U.S.C. § 1251(a) as those aliens who resided within the United States but who could be deported for certain reasons. In contrast, excludable aliens were defined in 8 U.S.C. § 1182(a) as those aliens who could be denied entry into the United States.

discretion by the BIA. Rodriguez also argues that if IIRIRA § 304(b) does apply to him, then the section is unconstitutional because it violates his constitutional rights to due process and equal protection.[5]

With these statutory and constitutional claims in mind, we turn to the jurisdictional issue presented in these cases.

III.

DISCUSSION

A.

Scope of Jurisdictional Inquiry

Although the government's motions to dismiss are directed to the pending petitions for review, determination of our jurisdiction over the petitions for review is inextricably intertwined with the question whether the district courts have continued habeas jurisdiction. The imperative to avoid a constitutional crisis that might arise were the writ of habeas corpus effectively sus-

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[5] Rodriguez also argues, for the first time in his reply brief, that IIRIRA § 304(b) does not apply to him because the INS issued a detainer notice prior to April 1, 1997, and therefore that his case was pending when § 304(b) became effective. *See Sandoval v. Reno*, 166 F.3d 225, 239-42 (3d Cir. 1999) (holding that AEDPA § 440(d) does not apply retroactively to cases pending on the date of AEDPA's enactment); *cf. Wallace v. Reno*, 194 F.3d 279 (1st Cir. 1999) (holding that case was commenced for retroactivity purposes when the INS issued an order to show cause even though the INS did not file that order to show cause with the immigration court until after AEDPA's enactment). Because of our ultimate disposition of this matter, we do not consider whether Rodriguez has waived this claim. *See Republic of Philippines v. Westinghouse Elec. Corp.*, 43 F.3d 65, 71 n.5 (3d Cir. 1994) (noting requirement that appellants raise issues in opening brief).

pended or were there no viable means for judicial review of constitutional claims necessarily affects, even if indirectly, the construction of the relevant statutory provisions. The viability of habeas jurisdiction is not a mere hypothetical issue, as petitioner Rodriguez has filed, in addition to the petition for review before us, a petition for habeas corpus in the district court presenting the same or similar issues, which that court has not yet decided.

Indeed, recently, in *Max-George v. Reno*, 205 F.3d 194 (5th Cir. 2000), the Court of Appeals for the Fifth Circuit declined to consider the tension its reading of the permanent rules as stripping the district courts of habeas corpus jurisdiction created with the Suspension Clause because the issue was raised on an appeal from the denial of habeas corpus rather than on a petition for review, as here. The court stated, "had Max-George filed a petition for review, we would have to decide whether the preclusion of habeas review to him can be reconciled both with the constitutional limitation on the 'suspension' of habeas corpus and the constitutional guarantee of due process." *Id.* at 200-201.

Rodriguez has attempted to invoke the courts' jurisdiction both through filing a petition for review in this court and filing a petition for a writ of habeas corpus in the district court. He did move in this court to stay briefing on the petition for review until the habeas matter was decided, but we proceeded to hear the pending consolidated petitions for review. Counsel advised us at the oral argument that there has been no action taken in the district court, presumably because that court is awaiting a decision on the jurisdictional issue in this case. The interrelationship between the issues is therefore evident.

The ultimate question in these cases is one of forum: a determination of which federal court, if any, has jurisdiction to hear petitioners' claims.

B.

AEDPA and the Transitional Rules of IIRIRA

The jurisdictional issue arose with Congress's enactment of AEDPA on April 24, 1996. That statute included two judicial review provisions relevant to immigration cases. Section 401(e) of AEDPA repealed § 106(a)(10) of the INA, which had expressly provided for habeas review of immigration cases in the federal courts; § 440(a) of AEDPA substituted the following language in its place: "Any final order of deportation against an alien who is deportable by reason of having committed a criminal offense [covered in the deportation provisions of the INA] shall not be subject to review by any court." 8 U.S.C. § 1105a(a)(10) (repealed by IIRIRA § 306(b) with respect to deportation proceedings commenced after April 1, 1997). On September 30, 1996, Congress enacted IIRIRA, which, as noted above, changed many of the amendments that AEDPA had made.

In *Morel v. INS*, 144 F.3d 248 (3d Cir. 1998), we held that AEDPA § 440(a) removed our jurisdiction to review a claim of legal error on petition for review brought by an alien with a criminal conviction. *Id.* at 250-51. In that case, we did not reach the issue of whether the district courts continued to have habeas jurisdiction over those claims under AEDPA or the transitional rules of IIRIRA.

In *Sandoval v. Reno*, 166 F.3d 225 (3d Cir. 1999), we were faced with that issue. Sandoval had filed a petition for review of the BIA's entry of a final order of deportation against him. In addition, he had filed a petition for a writ of habeas corpus in the district court. He argued that AEDPA's amendment of § 212(c) to permit discretionary waiver of removal for aliens in exclusion proceedings but not for aliens in deportation proceedings

did not apply to cases pending on the date of enactment of AEDPA, and that if it did apply to him § 212(c) as amended by AEDPA violated equal protection. The district court agreed with *Sandoval*'s statutory construction and granted the writ on the ground that AEDPA § 440(d) did not apply to cases that were pending when the statute was enacted. The government appealed, and that appeal was consolidated with Sandoval's petition for review.

The government argued that AEDPA and the transitional rules of IIRIRA divested the district courts of habeas jurisdiction. In forwarding that position, it relied on the following statutory provisions: AEDPA §§ 401(e) and 440(a), referred to above; IIRIRA § 309(c)(4)(G), a transitional rule which provides that "there shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having committed a criminal offense [covered in the deportation provisions of the INA]," and IIRIRA § 306(a), which amended INA § 242(g) to provide:

> Exclusive Jurisdiction. Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act.

8 U.S.C. § 1252(g). The government contended that AEDPA and the transitional rules of IIRIRA stripped the district courts of their habeas jurisdiction over all immigration cases and placed exclusive jurisdiction in the courts of appeals. Further, to avoid a jurisdictional scheme that provided no judicial review of constitutional claims brought by aliens with criminal convictions, the

government encouraged us to read an exception for those claims into transitional rule § 309(c)(4)(G).

We relied on the "longstanding doctrine disfavoring repeal of jurisdictional statutes by implication" as recently articulated by the Supreme Court in *Felker v. Turpin*, 518 U.S. 651, 116 S.Ct. 2333, 125 L.Ed.2d 827 (1996), to hold, contrary to the government's position, that neither AEDPA nor the transitional rules of IIRIRA divested the district courts of habeas jurisdiction because none of the applicable provisions expressly stated that Congress sought to preclude habeas jurisdiction as it exists under 28 U.S.C. § 2241. *Sandoval*, 166 F.3d at 231. We examined the Supreme Court's age-old decisions in *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 19 L.Ed. 264 (1868), and *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 19 L.Ed. 332 (1868), together with *Felker*, and concluded:

> Read together, *McCardle*, *Yerger*, and *Felker* establish the propositions that courts should not lightly presume that a congressional enactment containing general language effects a repeal of a jurisdictional statute, and, consequently, that only a plain statement of congressional intent to remove a particular statutory grant of jurisdiction will suffice.

Sandoval, 166 F.3d at 232.

Applying these propositions to the provisions of AEDPA and the transitional rules of IIRIRA, we determined that "since AEDPA § 401(e) does not manifest an intent to repeal the original grant of habeas corpus jurisdiction, currently embodied in 28 U.S.C. § 2241, the elimination of INA's reference to habeas jurisdiction does not overcome the presumption against finding a repeal of habeas corpus by implication." *Id.* at 234-35. Similarly, in analyzing the effect of IIRIRA transitional rule § 309(c)(4)(G) and AEDPA § 440(a) on the district

courts' habeas jurisdiction, we stated that "[n]either of these provisions specifically mentions jurisdiction under § 2241. Hence, under *Felker* and *Yerger*, we do not find a sufficiently clear statement of congressional intent to repeal the general grant of habeas jurisdiction." *Id.* at 235. And finally, in analyzing the effect of IIRIRA § 306(a), amending INA § 242(g), we determined that "[a]s there is no express reference to jurisdiction under 28 U.S.C. § 2241 in this provision, the rule disfavoring implied repeals requires us to conclude that jurisdiction under § 2241 is preserved . . . ." *Id.* at 236.

We held that no repeal would be implied in light of the absence of an express revocation of the district courts' habeas jurisdiction. Further, we concluded that *Sandoval*'s statutory claim, as well as any constitutional claim, was cognizable in a habeas corpus proceeding, "[i]nasmuch as the language of the habeas corpus statute encompasses claims that one 'is in custody in violation of the Constitution or laws or treaties of the United States,' 28 U.S.C. § 2241(c)(3)." *Id.* at 238. In doing so, we left open the question whether substantial constitutional questions might still be brought by an alien with a criminal conviction on petition for review. *See id.* at 238 n.6 ("Because of our conclusion that [habeas jurisdiction] covers statutory, as well as constitutional claims, we need not decide whether the claimed existence of jurisdiction in the courts of appeals to review substantial constitutional claims, but not statutory claims, would be an adequate alternative.").

Shortly after our decision in *Sandoval*, the Supreme Court decided *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 119 S.Ct. 936, 142 L.Ed.2d 940 (1999), in which it rejected the government's position that the limitation of court jurisdiction in the new INA § 242(g) covered all or nearly all deportation claims. Instead, the Court held that § 242(g),

which applies to cases under both the permanent and transitional rules, covers only three discrete actions of the Attorney General: "her 'decision or action' to 'commence proceedings, adjudicate cases, or execute removal orders.' " *Id.* at 482, 119 S.Ct. 936.

After *American-Arab*, we held in *Catney v. INS*, 178 F.3d 190 (3d Cir. 1999), that under AEDPA and the transitional rules of IIRIRA any challenge by a criminal alien to the BIA's interpretation of the immigration laws or to the constitutionality of those laws, even a claim involving substantial constitutional issues, must be made through a habeas petition rather than through a petition for review. By answering the question left open in *Sandoval*, we foreclosed any exception to the bar on petition for review jurisdiction over criminal aliens under the transitional rules.

Finally, in *DeSousa v. Reno*, 190 F.3d 175 (3d Cir. 1999), the most recent decision of our series on this issue, we upheld the jurisdictional analysis of *Sandoval* as consistent with the Supreme Court's decision in *American-Arab*. We rejected the government's assertion that constitutional and statutory challenges fall within the scope of INA § 242(g), and concluded that "*American-Arab* did not affect the remainder of *Sandoval*'s rulings." *Id.* at 183.

The vast majority of the other courts of appeals have adopted principles similar to those enunciated in *Sandoval* and have also found that district courts retain habeas jurisdiction after the enactment of AEDPA and IIRIRA's transitional rules. *See Magana-Pizano v. INS*, 200 F.3d 603, 609 (9th Cir. 1999) (holding that 28 U.S.C. § 2241 "remains an available remedy to those challenging executive detention" under AEDPA and the transitional rules of IIRIRA); *Pak v. Reno*, 196 F.3d 666, 673 (6th Cir. 1999) (following reasoning of *Sandoval* and *Goncalves v. Reno*, 144 F.3d 110 (1st Cir.

1998); and concluding that neither AEDPA amendments nor transitional rules of IIRIRA divest district courts of habeas jurisdiction because the applicable sections "[do] not refer to § 2241"); *Bowrin v. INS*, 194 F.3d 483, 489 (4th Cir. 1999) (per curiam) ("Finding no . . . specific reference to § 2241, we apply the long-standing rule disfavoring repeal of jurisdictional provisions by implication."); *Jurado-Gutierrez v. Greene*, 190 F.3d 1135, 1145-46 (10th Cir. 1999) (holding that "the lack of any mention of § 2241 habeas review in the plain language of the statute, combined with the long historical precedent surrounding habeas corpus review in immigration cases, establishes that traditional habeas review under § 2241 survived the enactment of AEDPA § 440(d) and IIRIRA § 309(c) [the transitional rules]") *cert. denied*, ___ U.S. ___, 120 S.Ct. 1539, ___ L.Ed.2d ___ (2000); *Shah v. Reno*, 184 F.3d 719, 724 (8th Cir. 1999) ("In sum, we hold that Congress in enacting AEDPA and IIRIRA in 1996, did not clearly and expressly repeal 28 U.S.C. § 2241."); *Mayers v. INS*, 175 F.3d 1289, 1301 (11th Cir. 1999) (holding that AEDPA's repeal of INA § 106(a)(10) did not repeal district courts' habeas jurisdiction for cases falling under the transitional rules of IIRIRA); *Henderson v. INS*, 157 F.3d 106, 118-22 (2d Cir. 1998) (relying on earlier decision in *Jean-Baptiste v. Reno*, 144 F.3d 212 (2d Cir. 1998), and concluding that without express reference to § 2241 it would not find bar on federal courts' habeas jurisdiction), *cert. denied*, 526 U.S. 1004, 119 S.Ct. 1141, 143 L.Ed.2d 209 (1999); *Goncalves v. Reno*, 144 F.3d 110, 119-23 (1st Cir. 1998) (concluding that repeal of INA § 106(a)(10) did not repeal habeas jurisdiction because there is no explicit reference in AEDPA to habeas jurisdiction under § 2241), *cert. denied*, 526 U.S. 1004, 119 S.Ct. 1140, 143 L.Ed.2d 208 (1999); *cf. Requena-Rodriguez v. Pasquarell*, 190 F.3d 299 (5th Cir. 1999) (holding that

habeas jurisdiction exists under transitional rules but implying that the court might conclude in a case under the permanent rules that language in § 242(g) and § 242(b)(9) is sufficiently express to preclude habeas jurisdiction). Only the Court of Appeals for the Seventh Circuit, interpreting AEDPA and the transitional rules, has held to the contrary. *See La Guerre v. Reno*, 164 F.3d 1035 (7th Cir. 1998) (holding that AEDPA § 440(a), amending INA § 106(a), divested district courts of habeas jurisdiction), *cert. denied*, ___ U.S.___, 120 S.Ct. 1157, 145 L.Ed.2d 1069 (2000).

C.

The Permanent Rules of IIRIRA

Because deportation proceedings were not initiated against any of the petitioners until after April 1, 1997, the permanent rules apply to their cases. The government invokes several jurisdictional provisions that are part of the permanent rules in support of its motions to dismiss. It argues that under these provisions, "the court of appeals is now the exclusive forum for all immigration matters," including "the interpretation of statutory and constitutional issues under 28 U.S.C. § 2241." Respondent's Brief at 12. According to the government, therefore, the permanent rules divest the district courts of their habeas jurisdiction where the transitional rules, as we held in *Sandoval*, did not. Further, the government asserts that "[o]nce the court determines that a petitioner is an alien who has been ordered removed for a qualifying criminal conviction," the court of appeals lacks jurisdiction "to review any other challenge the petitioner might raise to his removal proceedings." *Id.* at 4. It argues that because the permanent rules were not before us in *Sandoval*, that decision is inapplicable.

The first of the provisions to which the government refers, INA § 242(a)(2)(C), provides:

> Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

8 U.S.C. § 1252(a)(2)(C).

INA § 242(a)(1), also in the permanent rules, provides:

> Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of Title 28, except as provided in subsection (b) of this section and except that the court may not order the taking of additional evidence under section 2347(c) of Title 28.

8 U.S.C. § 1252(a)(1).

The government places its principal reliance for its argument that the permanent rules divest the district courts of habeas jurisdiction on INA § 242(b)(9), which provides:

> Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section.

8 U.S.C. § 1252(b)(9). The government argues that because INA § 242(b)(2) requires that all petitions for review "be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings," 8 U.S.C. § 1252(b)(2), § 242(b)(9) necessarily divests the district courts of their habeas jurisdiction.

There is no reason why the jurisdictional ruling in this case under the permanent rules should be any different than that we reached under the transitional rules. Although the text of these provisions differs somewhat from the sections of the transitional rules that were considered in *Sandoval*, those sections, AEDPA §§ 440(a), 401(e), IIRIRA § 309(c)(4)(G), and INA § 242(g), used language comparably comprehensive. Indeed, the phrase "notwithstanding any other provision of law" in INA § 242(a)(2)(C) also appears in INA § 242(g), which we did consider in *Sandoval*. *See Sandoval*, 166 F.3d at 236-38. That phrase did not persuade us then to hold that Congress had implicitly repealed § 2241 habeas jurisdiction; there is no reason why it would have a different effect now.

The difficulty with the government's effort to convince us that the language of § 242(b)(9), or of any of the permanent rules, requires a different result than that reached in *Sandoval* is that no language in the permanent rules fills the gap we found in *Sandoval*. None of the provisions, including INA § 242(b)(9), expressly refers to habeas jurisdiction or to 28 U.S.C. § 2241. None expressly revokes habeas jurisdiction.

As we explained in *Sandoval*, a repeal of habeas jurisdiction will not be found by implication. This is the holding of the Supreme Court's 1996 decision in *Felker*, 518 U.S. 651, 116 S.Ct. 2333, 135 L.Ed.2d 827. In that case, the Supreme Court considered whether Title I of AEDPA, which imposed significant restrictions on the

availability of the writ of habeas corpus, deprived the Court itself of jurisdiction to entertain original habeas petitions. The Court noted that no provision of Title I mentioned its authority to hear habeas petitions filed as original matters. Guided by its earlier decision in *Ex Parte Yerger*, 75 U.S. (8 Wall.) 85, 19 L.Ed. 332 (1868), the Court therefore held that:

> Although [AEDPA] precludes us from reviewing, by appeal or petition for certiorari, a judgment on an application for leave to file a second habeas petition in district court, it makes no mention of our authority to hear habeas petitions filed as original matters in this Court. As we declined to find a repeal [of our power to entertain habeas petitions in *Yerger*] we decline to find a similar repeal of § 2241 of Title 28 . . . by implication now.

Id. at 661, 116 S.Ct. 2333.

The holding of the Supreme Court is clear. A repeal of habeas jurisdiction can only be effected by express congressional command. That was the basis for our decision in *Sandoval*. *See Sandoval*, 166 F.3d at 232 (examining the propositions established by the Supreme Court in *Felker*, *Yerger*, and *McCardle*). That holding is as applicable to the permanent rules as it was to the transitional rules in *Sandoval*.

The government is correct that *Sandoval* involved only the transitional rules, not the permanent rules, but the legal principle relied on by this court transcends the narrow context of the transitional rules. *See*, *e.g.*, *John Hancock Mut. Life Ins. Co. v. Olick*, 151 F.3d 132, 139 (3d Cir. 1998) ("To be sure, there may be a number of factual grounds to distinguish our holding in [an earlier case], but the legal principle announced in that case directly controls the issue presented . . . ."). We unquestionably interpreted *Felker* in *Sandoval* as requir-

ing an explicit reference to habeas jurisdiction or its statutory provision in order to find an express congressional intent to repeal. As this court has frequently noted, "[A] panel of this court cannot overrule a prior panel precedent." *O. Hommel Co. v. Ferro Corp.*, 659 F.2d 340, 354 (3d Cir. 1981); *see* Internal Operating Procedures, United States Court of Appeals for the Third Circuit, Rule 9.1 ("[T]he holding of a panel in a reported opinion is binding on subsequent panels. . . . Court in banc consideration is required [to overrule such a holding].").

This is not a case in which there have been "intervening developments" that counsel reevaluation of the underlying premise of *Sandoval*. *Cf. Reich v. D.M. Sabia Co.*, 90 F.3d 854, 858-59 (3d Cir. 1996) (finding that subsequent statutory amendment and Supreme Court precedent permitted reevaluation of earlier panel decision). Notwithstanding the government's suggestion to the contrary, nothing in the Supreme Court's 1999 decision in *American-Arab*, 525 U.S. 471, 119 S.Ct. 936, 142 L.Ed.2d 940, bears on our reasoning in *Sandoval*.

American-Arab arose after the INS instituted deportation proceedings against several aliens who belonged to the Popular Front for the Liberation of Palestine, a group that the government characterized as a terrorist group. The aliens filed suit in district court seeking injunctive and declaratory relief on the ground that the INS was selectively enforcing immigration laws against them in violation of their First and Fifth Amendment rights. After Congress passed IIRIRA, the government sought to dismiss the case for lack of jurisdiction, arguing that INA § 242(g), made applicable by § 306(c)(1) of IIRIRA to the aliens' cases, deprived the courts of jurisdiction over the selective enforcement claim. In reconciling an apparent conflict between IIRIRA § 306(c)(1), which made INA § 242(g) applicable to all cases, includ-

ing those pending on the date of IIRIRA's enactment, and transitional rule § 309(c)(1)(B), which stated the general rule that the amendments of IIRIRA would not apply to pending cases, the Supreme Court rejected a broad reading of INA § 242(g). The Court held that § 242(g) applied only to "three discrete events along the road to deportation": the Attorney General's uniquely discretionary decisions to commence proceedings, adjudicate cases, or execute removal orders. *Id.* at 482, 119 S.Ct. 936. It compared the limited scope of that section with the more expansive reach of § 242(b)(9) (a "zipper" clause). *Id.* at 483, 119 S.Ct. 936. Because § 242(g) did apply to the Attorney General's decision to prosecute the plaintiff aliens, the Court held that the district court lacked jurisdiction over the plaintiffs' suit.

The government argues that it is clear from the Court's characterization in *American-Arab* of § 242(b)(9) as an "unmistakable 'zipper' clause," *id.*, that the courts of appeals are the exclusive forum for all immigration claims. That reading attributes to the discussion in American-Arab a meaning that extends beyond the matter at issue, which was the interplay between IIRIRA §§ 306(c)(1), 309(c)(1)(B), and INA § 242(g).

The language of INA § 242(b)(9), even without the Court's comparing it with that of § 242(g), makes it evident that § 242(b)(9) was intended to apply to a broader range of decisions than the three categories to which the Court referred in *American-Arab*. However, that does not mean that the Court intended to hold, without explicit discussion, that § 242(b)(9) has the radical effect of eliminating habeas jurisdiction. In fact, the underlying suit in *American-Arab* was not a habeas petition under 28 U.S.C. § 2241 but a civil suit for injunctive and declaratory relief that relied for its jurisdiction on 28 U.S.C. § 1331. The Supreme Court never considered whether IIRIRA divests the district courts of habeas

jurisdiction. Rather, the Court noted that there was disagreement in the courts of appeals on the issue and expressed no view on the issue's resolution. *See id.* at 480 & n.7, 119 S.Ct. 936. Although we agree that § 242(b)(9) clearly expresses congressional intent that judicial review of questions arising from a proceeding brought to remove an alien be conducted under the INA in the courts of appeals, we do not agree that it clearly expresses congressional intent that the district courts be divested of their habeas jurisdiction under § 2241, the issue considered here.

The government notes that the Court of Appeals for the Eleventh Circuit relied on § 242(b)(9) in holding that the district courts no longer have habeas jurisdiction under 28 U.S.C. § 2241 to review any challenge to an alien's removal proceedings. *See Richardson v. Reno* (*Richardson II*), 180 F.3d 1311, 1315 (11th Cir. 1999), *cert. denied*, ___ U.S. ___, 120 S.Ct. 1529, ___ L.Ed.3d ___ (2000). Richardson, a thirty-year permanent legal resident in this country with convictions for firearms and drugs offenses, was detained by the INS as he attempted to re-enter the United States after a two-day trip to Haiti. He filed a petition for a writ of habeas corpus, asserting that the INS's illegal detention, denial of admission, and denial of a bond hearing violated his constitutional and statutory rights as a lawful permanent resident alien. Because Richardson's removal proceedings began in October 1997, the permanent rules applied to his case.

When the case first came to the Eleventh Circuit, the court held that INA § 242(g) repealed district court habeas jurisdiction. *See Richardson v. Reno* (*Richardson I*), 162 F.3d 1338 (11th Cir. 1998). *Richardson I* was vacated by the Supreme Court, and remanded for reconsideration in light of its decision in *American-Arab*. *See Richardson v. Reno*, 526 U.S. 1142, 119 S.Ct. 2016, 143 L.Ed.2d 1029 (1999). On remand, the court of appeals

recognized that, in light of the Supreme Court's narrow reading of § 242(g), that sec-tion did not divest the district court of habeas jurisdiction over Richardson's case. Nevertheless, the court reaffirmed its earlier decision on the ground that *Richardson I* rested not just on its interpretation of INA § 242(g) but also of INA § 242(b)(9) as well as the "overall judicial review scheme enacted in INA § 242(b)." *Richardson II*, 180 F.3d at 1314. The court concluded that "[a]ny constitutional infirmities Richardson perceives in th[e] INA-proscribed judicial review must be raised in an attack on the constitutionality of INA § 242(a)(2)(C) only in the court of appeals and only after a final removal order." *Id.* at 1316 (quoting *Richardson I*, 162 F.3d at 1376).

More recently, the Court of Appeals for the Fifth Circuit has followed the Eleventh Circuit in holding that under the permanent rules district courts are divested of their habeas jurisdiction. *See Max-George v. Reno*, 205 F.3d 194 (5th Cir. 2000). Although the Fifth Circuit had interpreted the transitional rules as preserving the district courts' habeas jurisdiction, it had foreseen the possibility of a different result under the permanent rules. *See Requena-Rodriguez*, 190 F.3d at 305-06. Thus, its decision in *Max-George* was not unexpected. It reasoned that the phrase "notwithstanding any other provision of law" in INA § 242(a)(2)(C), which had not appeared before it under the transitional rules, "clearly precludes habeas jurisdiction under 28 U.S.C. § 2241." *Max-George*, 205 F.3d at 198.[6] In contrast, as we noted above,

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[6] We note in passing that Max-George had already been deported and the government argued that the case was moot. The court overcame the mootness argument by holding that a collateral consequence of his deportation was his future inadmissibility as a matter of law, whether he chose to return or not.

we did consider that phrase, which appears in § 242(g), in *Sandoval*. *See Sandoval*, 166 F.3d at 236-38.

Moreover, the "[n]otwithstanding any other provision of law" phrase that the court in *Max-George* found dispositive does not stand alone. The language that begins § 242(a)(2)(C) reads: "Notwithstanding any other provision of law, no court shall have jurisdiction *to review* . . . ." 8 U.S.C. § 1252(a)(2)(C) (emphasis added). In *Sandoval*, we reviewed the history of the Supreme Court's consistent affirmation since at least as far back as 1888 of the right of aliens to availability of the writ of habeas corpus in the district courts despite statutory language that restricted or eliminated judicial review of executive action in immigration matters. *Sandoval*, 166 F.3d at 233-34. We stated that when viewed in light of the history of the Court's treatment of habeas jurisdiction in deportation cases, the references to "review" in AEDPA and to "appeal" in IIRIRA are properly understood as relating to judicial review under the APA. *Id.* at 235. We continued, "This is so because in the immigration context, the Court has historically drawn a sharp distinction between 'judicial review'—meaning APA review—and the courts' power to entertain petitions for writs of habeas corpus." *Id.* The court's conclusion in *Max-George* that the writ of habeas corpus "is merely an 'other provision of law,' " *Max-George*, 205 F.3d at 198, that can be swept away by the phrase "[n]otwithstanding any other provision of law" fails to recognize or give effect to this historical distinction maintained by successive Supreme Court opinions.

The holdings of both *Richardson* cases and *Max-George* that Congress need not mention habeas or § 2241 to repeal the district courts' habeas jurisdiction are at odds not only with our reasoning in *Sandoval* but with the reasoning of the other courts of appeals that have read the Supreme Court's precedent in *Yerger* and *Felker*

to require explicit statutory reference to habeas or § 2241 to effect congressional repeal of habeas jurisdiction. *See Magana-Pizano*, 200 F.3d at 608-09 (interpreting *Felker* to require explicit reference to § 2241 to effect repeal of habeas corpus jurisdiction, noting that "[p]resumably, the holding in *Felker* placed Congress on notice that it could repeal habeas jurisdiction under § 2241 only by express command, and not by implication"); *Pak*, 196 F.3d at 673 ("Although AEDPA § 401(e) pointedly refers to INA § 106(a)(10), it does not refer to § 2241. Thus, despite the fact that AEDPA § 401(e) expressly repealed habeas jurisdiction under INA § 106(a)(10), absent a clear statement from Congress, we decline to interpret that provision as also repealing general habeas jurisdiction under § 2241."); *Bowrin*, 194 F.3d at 489 ("We believe that had Congress intended to eliminate all habeas jurisdiction under § 2241, it would have done so by using the same explicit references it used to repeal INA § 106(a)(10)."); *Jurado-Gutierrez*, 190 F.3d at 1145-46 ("We find the lack of any mention of § 2241 habeas review in the plain language of the statute, combined with the long historical precedent surrounding habeas corpus review in immigration cases, establishes that traditional habeas review under § 2241 survived the enactment of AEDPA § 440(d) and IIRIRA § 309(c)."); *Shah*, 184 F.3d at 724 ("AEDPA rather pointedly refers only to Section 106(a)(10) of the old Act. No reference is made to the general federal habeas corpus statute, though that statute was for decades routinely used to review executive decisions in immigration matters . . . ."); *Goncalves*, 144 F.3d at 119 ("*Felker* makes clear that if Congress intends to repeal or restrict habeas jurisdiction under § 2241, it must say so explicitly."). *But see LaGuerre*, 164 F.3d at 1038-39 (holding that AEDPA §§ 440(a) and 401(e) divested the district courts

of habeas jurisdiction, even without explicit reference to § 2241).[7]

The government argues that we should adopt the holding of *Richardson II* (and presumably now would include *Max-George*) rather than adhere to the reasoning we articulated in *Sandoval*. As we have explained, we see no reason to abandon the path taken in *Sandoval*. We continue to believe that had Congress intended to eliminate all habeas jurisdiction under § 2241, it would have done so by making its intent explicit in the language of the statute. Furthermore, as we recognized in *Sandoval*, this approach obviates the serious constitutional problems that would arise were we to adhere to our previous opinions holding we have no jurisdiction over petitions for review filed by an alien with a criminal conviction and read the permanent rules to strip the district courts of habeas jurisdiction.

The Suspension Clause provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. art. I, § 9, cl. 2. The *Max-George* court recognized that "[t]o some degree, IIRIRA's stripping of § 2241 jurisdiction implicates the guarantee that the 'Privilege of the Writ' preserved by the Constitution cannot be suspended," but it

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[7] It is of some interest that while *Richardson I* was awaiting reconsideration in light of *American-Arab*, the Eleventh Circuit decided *Mayers v. INS*, 175 F.3d 1289, 1299-1300 (11th Cir. 1999), a transitional rule case, in which the court applied the presumption against implied repeal of habeas jurisdiction articulated by the Supreme Court in *Felker* and held that neither AEDPA nor the transitional rules of IIRIRA divested the district courts of habeas jurisdiction because none of the provisions expressly referred to 28 U.S.C. § 2241 or habeas jurisdiction. When the court re-affirmed its *Richardson I* analysis of *Felker* in *Richardson II*, it sought to distinguish Mayers on factual and statutory grounds. *See* 180 F.3d at 1316 n.6.

then stated that the distinction between the scope of the writ of habeas corpus preserved in the Constitution and the scope of the writ granted by § 2241 "is immaterial when considered in the immigration context" where Congress may make rules "that would be unacceptable if applied to citizens." *Max-George*, 205 F.3d at 201 (internal quotations and citations omitted). We agree, of course, with the proposition that habeas corpus need not preserve review of discretionary decisions, but to the extent the court's discussion suggests that aliens are not entitled to the constitutional protection of habeas corpus, the Supreme Court cases cited and discussed in detail in *Sandoval*, *see* 166 F.3d at 233-34, pronounce precisely the opposite. *See*, *e.g.*, *United States v. Jung Ah Lung*, 124 U.S. 621, 8 S.Ct. 663, 31 L.Ed. 591 (1888) (alien entitled to writ of habeas corpus to reenter United States); *Nishimura Ekiu v. United States*, 142 U.S. 651, 660, 12 S.Ct. 336, 35 L.Ed. 1146 (1892) ("An alien immigrant, prevented from landing . . . is doubtless entitled to a writ of habeas corpus to ascertain whether the restraint is lawful."); *Heikkila v. Barber*, 345 U.S. 229, 234-35, 73 S.Ct. 603, 97 L.Ed. 972 (1953) (statute conferring finality on deportation decisions of Attorney General precluded "judicial intervention in deportation cases except insofar as it was required by the Constitution").

The government asserts that our concerns about avoiding constitutional problems are unfounded because the judicial review provisions applicable to the cases before us can be read to satisfy the Suspension Clause. Congress may divest the district courts of habeas jurisdiction without violating the Suspension Clause so long as it substitutes "a collateral remedy which is neither inadequate nor ineffective to test the legality of a person's detention." *Swain v. Pressley*, 430 U.S. 372, 381, 97 S.Ct. 1224, 51 L.Ed.2d 411 (1977).

Although the courts of appeals generally retain jurisdiction under new INA § 242(a)(1) to review an alien's challenge to his or her final order of removal via the alien's petition for review, a petition for review brought by an alien with a criminal conviction is excepted. New INA § 242(a)(2)(C) provides that "[n]otwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in [various sections of the INA]." 8 U.S.C. § 1252(a)(2)(C).

The government argues that, irrespective of this limitation on our petition for review jurisdiction, the courts of appeals retain jurisdiction under § 242 over petitions for review "to test the legality of a criminal alien's removal order." Respondent's Brief at 20. Apparently in response to the strong argument made by the amici ACLU and law professors that if the INA provides no review for petitioners' statutory as well as constitutional claims the Suspension Clause would not be satisfied, the government argues that we do have jurisdiction to review the merits of petitioners' statutory as well as constitutional claims in such cases. It asserts that under § 242(a)(2)(C) we have jurisdiction to determine whether each petitioner "(1) [is] an alien, (2) is removable, and (3) is removable by reason of having committed a qualifying crime. . . ." Respondent's Brief at 19. According to the government, the determination of removability is "very broad," permitting us to judge the merits of petitioners' statutory and constitutional challenges on a petition for review. Transcript of argument, Dec. 20, 1999 at 61.

If we were to accept this suggestion, it would create the awkward situation of requiring analysis of the merits of a petitioner's challenge in making a preliminary jurisdictional determination. Moreover, the government's

position at this juncture is difficult to reconcile with its earlier position taken in *Sandoval* that at most the courts of appeals could review "substantial constitutional" issues on petition for review.[8] Our response in *Sandoval*, noting that neither the statute nor the legislative history support such a statutory construction, is even more applicable here.

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[8] The government's different positions here and in *Sandoval* on the issue of the courts' jurisdiction to hear a statutory claim raised by an alien with a criminal conviction is illustrative of its vacillation on this issue. In its brief on appeal from the district court's ruling on Sandoval's habeas petition, the government argued that there was no jurisdiction either in the court of appeals or in the district court to hear aliens' statutory claims, maintaining that the Suspension Clause was not implicated because "judicial review required under the Suspension Clause extends only to claims of substantial constitutional error amounting to a fundamental miscarriage of justice." Government Brief at 30, *Sandoval v. Reno*, No. 98-1099. It took the same position in its brief on Sandoval's petition for review, where it stated, "Sandoval's contention that the Board erred as a matter of statutory construction in concluding that AEDPA § 440(d) applies to cases pending upon enactment is a non-reviewable claim of legal error." Government Brief at 5, *Sandoval v. INS*, No. 98-3214. At argument in the cases before us, the government took a considerably more expansive view of the scope of our jurisdiction to hear the petitioners' statutory claims, stating"[I]n determining whether a criminal alien is removable, you need to look at whether his removal order is constitutionally *and statutorily legal*, whether it's valid or not, before you can decide whether the bar applies to him." Transcript of argument, Dec. 20, 1999 at 66 (emphasis added). On several occasions during the argument, the government set forth its position that "there is review that is commensurate with 2241 review in this court under 242. This court can look at and answer any question that this alien could raise under 2241." *Id.* at 65. The government's fluctuation strengthens our decision to base our holding on our interpretation of the statutory language as preserving habeas jurisdiction under *Felker* rather than on the government's concessions at oral argument—concessions from which it might retreat in the next case.

> This argument must fail because of the absence of any support, either in the statute or in the legislative history. The government's briefs cite no provision of AEDPA or IIRIRA that supports its reading and it conceded at oral argument that there is no specific provision granting us jurisdiction over substantial constitutional claims. Although the government's argument would have more force if there were a constitutional imperative to read the 1996 statutes in that manner, our conclusion that the statutes have left habeas jurisdiction intact in the district courts removes any such imperative.

Sandoval, 166 F.3d at 237-38. For the same reason, we do not see how INA § 242 can support the broader position the government now takes.

On the contrary, the language of § 242(a)(2)(C) makes clear that we lack jurisdiction over the petitions for review filed by Cinquemani, Rodriguez, and Liang in the cases before us. The effect of § 242(a)(2)(C) is similar to that of IIRIRA § 309(c)(4)(G), which we interpreted in *Catney*, 178 F.3d 190, and to that of AEDPA § 440(a), which we interpreted in *Morel*, 144 F.3d 248.

Like *Catney* and *Morel*, petitioners in the cases before us do not dispute that they are aliens with criminal convictions that render them removable under the INA. In other words, they do not dispute that they are aliens who are "removable by reason of having committed a[specified] criminal offense." 8 U.S.C. § 1252(a)(2)(C). Rather, they raise statutory challenges to the BIA's interpretation of recent amendments and constitutional challenges to the statute itself, seeking the availability of a discretionary waiver under former INA § 212(c).

We see no material distinction between the transitional rules and the permanent rules governing petitions for review of an alien with a criminal conviction.

Accordingly, we hold that we lack jurisdiction under § 242(a)(2)(C) over the petitions for review.

IV.

CONCLUSION

We recognize that our decision perpetuates the division in the courts of appeals interpreting the amendments to the immigration laws. Indeed, were the judges' preferences determinative, it is likely that many would opt for a system under which aliens' challenges to nondiscretionary immigration decisions, both statutory as well as constitutional, would be reviewed directly in the courts of appeals. But that is not the way in which we read the legislation that Congress has enacted, and it is our obligation to interpret the statutes we are given, while at the same time interpreting the Constitution in accord with the Supreme Court's precedent.

Because we lack jurisdiction under INA § 242(a)(2)(C) over the petitions for review brought by Cinquemani, Rodriguez, and Liang challenging their final orders of removal, the petitions will be dismissed without prejudice to Rodriguez's pending petition under 28 U.S.C. § 2241 for a writ of habeas corpus.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-5053

XU CHENG LIANG,

Petitioner

v.

IMMIGRATION & NATURALIZATION SERVICE,

Respondent

Petition for Review of a Decision
of the Immigration & Naturalization Service
(A40 278 218)

No. 99-5327

GIOACCHINO CINQUEMANI,

Petitioner

v.

IMMIGRATION & NATURALIZATION SERVICE,

Respondent

Petition for Review of a Decision
of the Immigration & Naturalization Service
(A35 098 342)

No. 99-6039

CARMELO JOSE RODRIGUEZ,

Petitioner

v.

IMMIGRATION & NATURALIZATION SERVICE,

Respondent

Petition for Review of a Decision
of the Immigration & Naturalization Service
(A38 502 331)

Argued December 20, 1999

Present:

Sloviter, Roth and Cowen, *Circuit Judges*

JUDGMENT

These causes came on to be heard on the records from the Immigration & Naturalization Service and were argued on December 20, 1999.

On consideration whereof, it is now here ordered and adjudged by this Court that the petitions for review by Mr. Cinquemani, Mr. Rodriguez, and Mr. Liang are hereby dismissed for lack of jurisdiction without prejudice to Mr. Rodriguez's pending petition under 28 U.S.C. Section 2241 for a writ of habeas corpus. Costs taxed against petitioners. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ P. DOUGLAS SIRK
Clerk

Dated: March 9, 2000

Appendix C

IMMIGRATION COURT
970 Broad Street, Room 1135
Newark, NJ 07102

Case A38-502-331

In the Matter of
CARMELO JOSE RODRIGUEZ

Respondent

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on December 9, 1997. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in the case.

[X] The respondent was ordered removed from the United States to Dominican Republic.

[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to _____ alternative to _____.

[ ] Respondent's application for voluntary departure was granted until _____ upon posting a bond in the amount of $ _____.
with an alternate order of removal to _____

[ ] Respondent's application for asylum was ( ) granted ( ) denied ( ) withdrawn.

[ ] Respondent's application for withholding of removal was ( ) granted ( ) denied ( ) withdrawn.

[ ] Respondent's application for cancellation of removal under section 240A(a) was ( ) granted ( ) denied ( ) withdrawn.

[ ] Respondent's application for cancellation of removal was ( ) granted under section 240A(b)(1) ( ) granted under section 240A(b)(2) ( ) denied ( ) withdrawn. If granted, it was ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[X] Respondent's application for a waiver under section 212(c) of the INA was ( ) granted (X) denied ( ) withdrawn or ( ) other.

[ ] Respondent's application for adjustment of status under section _____ of the INA was ( ) granted ( ) denied ( ) withdrawn. If granted, it was ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Respondent's status was rescinded under section 246.

[ ] Respondent is admitted to the United States as a _____ until _____.

[ ] As a condition of admission, respondent is to post a $ _____ bond.

[ ] Respondent knowingly filed a frivolous asylum application after proper notice.

[ ] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.

[ ] Proceedings were terminated.

[ ] Other: _____

Date:

Appeal ~~WAIVED~~ Appeal Due By: 1/8/98

Appeal by Alien

/s/ HENRY S. DOGIN
HENRY S. DOGIN
Immigration Judge

Appendix D

U.S. Department of Justice

Executive Office for Immigration Review
Board of Immigration Appeals
Office of the Clerk

P.O. Box 8530
5201 Leesburg Pike, Suite 1300
Falls Church, Virginia 22041

Kelman, Lorale, Esq.
19 WEST 34TH STREET, SUITE 818
New York, NY 10001-0000

Office of the District Counsel/NE
970 Broad St., Rm. 1104B
Newark, NJ 07102

December 29, 1998

RODRIGUEZ, CARMELO JOSE
A#: 38-502-331

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Very Truly Yours,

/s/ PAUL W. SCHMIDT
Paul W. Schmidt,
Chairman

Enclosure

Panel Members:

HURWITZ, GERALD S.
MORSE, MARVIN H.
SCIALABBA, LORI L.

Decision of the Board of Immigration Appeals

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

File: A38 502 331 - Newark Date: Dec 29 1998

In re: CARMELO JOSE RODRIGUEZ
a.k.a. Carmelo Rodriguez

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

Lorne J. Kelman, Esquire
19 West 34th Street, Suite 818
New York, New York 10001

ON BEHALF OF SERVICE:

Charles Parker, Jr.
District Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(ii), I&N Act
[8 U.S.C. § 1227(a)(2)(A)(ii)]-
Convicted of two or more crimes
involving moral turpitude

Sec. 237(a)(2)(A)(iii), I&N Act
[8 U.S.C. § 1227(a)(2)(A)(iii)]-
Convicted of aggravated felony

Sec. 237(a)(2)(B)(i), I&N Act
[8 U.S.C. § 1227(a)(2)(B)(i)]-
Convicted of controlled substance
violation

ORDER:

PER CURIAM. The respondent is statutorily ineligible for cancellation of removal pursuant to section 240A(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(a), because he has been convicted of an aggravated felony as defined in section 101(a)(43)(B) of the Act, 8 U.S.C. § 1101(a)(43)(B). The respondent is also seeking relief from deportation under section 212(h) of the Act. However, due to the respondent's conviction of an aggravated felony, he is also ineligible for that form of relief. Section 212(h) of the Act, 8 U.S.C. § 1182(h). Since he is in removal proceedings, a waiver of inadmissibility under section 212(c) of the Act, 8 U.S.C. § 1182(c), is not a form of relief that is available. *See* section 304(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 ("IIRIRA"). The respondent's lack of eligibility is not affected by the fact that the respondent was convicted prior to the date of enactment of IIRIRA and the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 AEDPA.

Accordingly, the appeal is dismissed.

/s/ [ILLEGIBLE]
FOR THE BOARD

Appendix E

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-5053

XU CHENG LIANG,

Petitioner

v.

IMMIGRATION & NATURALIZATION SERVICE,

Respondent

No. 99-5327

GIOACCHINO CINQUEMANI,

Petitioner

v.

IMMIGRATION & NATURALIZATION SERVICE,

Respondent

No. 99-6039

CARMELO JOSE RODRIGUEZ,

Petitioner

v.

IMMIGRATION & NATURALIZATION SERVICE,

Respondent

SUR PETITION FOR REHEARING

Present: BECKER, *Chief Judge*, SLOVITER, MANSMANN, GREENBERG, SCIRICA, NYGAARD, ALITO, ROTH, MCKEE, BARRY, FUENTES, and COWEN,* *Circuit Judges*

The petition for rehearing filed by
Respondent INS,
in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active ser-

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* Hon. Robert E. Cowen, Senior Circuit Judge, as to panel rehearing only.

vice not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

/s/ [ILLEGIBLE] SLOVITER
Circuit Judge

Dated: JUN 9 2000

[Handwritten]:
ch/cc: CCF
AMI
JMM
TNC
MAK
KWB
AMS
TJS
JDW

Appendix F

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
DISTRICT OF NEW JERSEY

Civil Action No. 99-4300(JWB)

CARMELO JOSE RODRIGUEZ,

Petitioner/Plaintiff,

v.

JANET RENO, Attorney General of the United States; DORIS MEISSNER, Commissioner of the Immigration & Naturalization Service; ANDREA QUARANTILLO, District Director, Immigration and Naturalization Service; IMMIGRATION AND NATURALIZATION SERVICE; and the DEPARTMENT OF JUSTICE,

Defendants/Respondents.

APPEARANCES:

BRETZ & COVEN
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Alan Michael Strauss, Esquire
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ROBERT J. CLEARY
United States Attorney
By: Laura M. Smith
Assistant United States Attorney
Federal Building
970 Broad Street
Newark, New Jersey 07101

—and—

DAVID W. OGDEN
Acting Assistant Attorney General
By: Alison Marie Igoe, Esquire
Office of Immigration Litigation
U.S. Department of Justice
P.O. Box 878 Ben Franklin Station
Washington, D.C. 20044
(Attorneys for Defendants/Respondents)

BISSELL, *District Judge*

On December 9, 1997, an Immigration Judge ordered Carmelo Jose Rodriguez removed to the Dominican Republic. (*Id.*) On December 29, 1998, the Board of Immigration Appeals ("BIA") affirmed the order of removal. (*Id.*) Mr. Rodriguez is now subject to immediate deportation.

The facts in this case are not in dispute. Mr. Rodriguez filed this habeas corpus petition on September 9, 1999 requesting the Court to review the lawfulness of his final order of removal. Mr. Rodriguez, a native and citizen of the Dominican Republic, has been a lawful permanent resident of the United States ("LPR") since December 20, 1983. (Petition, ¶3). Mr. Rodriguez is married to Lourdes Checo, a United States citizen, and the couple

have two children, ages nine and six, who are also citizens of the United States. (*Id.*, ¶ 8). His parents and his three siblings are also United States citizens. (*Id.*) On February 19, 1993, Mr. Rodriguez pled guilty in New Jersey Superior Court, Hudson County, to two counts of receiving stolen property in the third degree, and one count of possession of a controlled, dangerous substance (cocaine) in the third degree. (*Id.*) He was sentenced to four years imprisonment, but was released on or about December 29, 1993. (*Id.*) Mr. Rodriguez was then extradited to Ohio, where, on March 28, 1994, he pled guilty in Hancock County Common Pleas Court, Findlay, Ohio, to the offense of receiving stolen property. He was sentenced to six months imprisonment, and released on or about June 28, 1994. (*Id.*) On or about November 5, 1995, Mr. Rodriguez pled guilty in New Jersey Superior Court to one count of receiving stolen property. He was sentenced to five years imprisonment, but he was released on or about March, 5, 1997. (*Id.*)

On May 9, 1994, the Immigration and Naturalization Service ("INS") issued an immigration detainer for Mr. Rodriguez with the Correctional Reception Center in Orient, Ohio. (*Id.*, ¶ 10). The Ohio Department of Rehabilitation and Correction received the detainer on May 13, 1994. The detainer indicated that the INS had initiated an investigation to determine whether Mr. Rodriguez was deportable. (*Id.*) The INS took no further action with regard to Mr. Rodriguez.

On or about May 1997, after his release from custody, Mr. Rodriguez lost his wallet with his alien Registration Receipt Card ("green card"). He called the INS to inquire about replacing his green card. (*Id.*, ¶ 12). On May 23, 1997, the INS issued a "Notice to Appeal" ("NTA"). The NTA alleged three grounds of removability: (1) INA § 237(a)(2)(A)(ii), 8 U.S.C. § 1227 (a)(2)(A)(ii), which applies to aliens convicted of two or

more crimes involving moral turpitude not arising out of a single scheme of criminal misconduct; (2) INA § 237(a)(2)(A)(iii), 8 U.S. C. § 1227(a)(2)(A)(iii), which applies to aliens convicted of aggravated felonies; and (3) INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i), which applies to aliens convicted of controlled substance offense. (Smith Cert., Exh. A). On July 1, 1997, Mr. Rodriguez was arrested at his home and served with the NTA. (Petition, ¶ 13). He was released from INS custody on bond and is now living in Jersey City, New Jersey. (*Id.*)

At his removal hearing held before an Immigration Judge ("IJ") on July 9, 1997, October 10, 1997 and December 9, 1997, Mr. Rodriguez conceded removability and was found to be removable under the three counts charged in the NTA. (*Id.*, ¶ 14). Mr. Rodriguez then applied for three forms of statutorily authorized discretionary relief from removal: (i) a waiver of deportation under former INA § 212(c), 8 U.S.C. § 1182(c) (1994); (ii) "cancellation of removal" under INA § 240A(a), 8 U.S.C. § 1229b(a); and (iii) adjustment of status pursuant to INA § 245, 8 U.S.C. § 1255, in conjunction with a waiver of inadmissibility under INA § 212(h), 8 U.S.C. § 1182(h). (*Id.*) The IJ found Mr. Rodriguez statutorily ineligible for all three forms of relief. The IJ ordered Mr. Rodriguez deported to the Dominican Republic. (*Id.*)

Mr. Rodriguez filed a timely appeal with the BIA, and on April 30, 1998, the BIA dismissed Mr. Rodriguez's appeal and affirmed the removal order. (*Id.*, ¶ 15). The BIA affirmed the IJ's finding that Mr. Rodriguez was statutorily ineligible for § 212(c) relief. In this petition, Mr. Rodriguez is challenging only the denial of § 212(c) relief. (*Id.*, ¶ 22). The habeas petition contains claims that the denial of § 212(c) relief was an improper retroactive application of IIRIRA § 304(b), that the

denial of § 212(c) relief violates the petitioner's due process rights under the fifth amendment, and a claim for laches.

Mr. Rodriguez filed this petition under this Court's habeas jurisdiction, 28 U.S.C. § 2241. However, Mr. Rodriguez also filed a petition for review with the United States Court of Appeals for the Third Circuit. The issues in the two petitions are substantially similar; therefore, this Court awaited the decision of the Court of Appeals, which was issued on March 9, 2000. This Court has jurisdiction pursuant to 28 U.S.C. § 2241.

ANALYSIS

The first issue before this Court is one of jurisdiction. The respondents argue that this Court does not have subject matter jurisdiction over Mr. Rodriguez' petition for habeas corpus relief. The government claims that under the permanent provisions of the IIRIRA, this Court lacks jurisdiction because (1) any judicial review available to Rodriguez must be sought in a federal appellate Court, and (2) Mr. Rodriguez is subject to IIRIRA's jurisdictional bar because he is removable by reason of his convictions for controlled substance offenses constituting aggravated felonies under the INS. (Respondents' Br. at 4).

The government relies primarily on two provisions. The first is INA § 242(b)(9), 8 U.S.C. § 1252(b)(9). It states that

> Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this title shall be

> available only in judicial review of a final order under this section.

8 U.S.C. § 1252(b)(9). The government argues that with this section, Congress intended to create a streamlined review of final orders of removal which would go straight to the appellate courts. This, the government argues, takes away the district court's power to review these issues, which implicitly removes the district court's habeas jurisdiction under 28 U.S.C. § 2241. This section, the government claims, creates a "zipper clause", as outlined in *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999).

In addition, the respondents rely upon § 242(a)(2)(c) of the INA, 8 U.S.C. § 1252(a)(2)(c), which states:

> Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii) [aggravated felony offenses], (B) [controlled substance offenses], (C), or (C) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

Mr. Rodriguez was convicted of receiving stolen property and possession of cocaine, and this offense falls within the aggravated felony definition of the INA. INA § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B) (Supp. II 1997) (including within the aggravated felony definition any "illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substances Act) . . ."). Therefore, the government argues that Mr. Rodriguez' petition is not reviewable by any court.

However, this Court finds the government's argument unpersuasive. The Third Circuit, in *Liang v. Immigration and Naturalization Service*, which involved the petition for review by this very petitioner, found that district courts do retain their habeas jurisdiction pursuant to 28 U.S.C. § 2241. 2000 WL 264216 (3d Cir.). The circuit court relied on the "longstanding doctrine disfavoring repeal of jurisdictional statutes by implication" to find that without an express statement of intent to divest the district courts' habeas jurisdiction under 2241, such jurisdiction was not divested. (*Id.* at *4).

> Read together, *McCardle*, *Yerger*, and *Felker* establish the propositions that courts should not lightly presume that a congressional enactment containing general language effects a repeal of a jurisdictional statute, and, consequently, that only a plain statement of congressional intent to remove a particular statutory grant of jurisdiction will suffice.

Liang, 2000 WL *4 (citing *Sandoval v. Reno*, 166 F.3d 225, 232(3d Cir. 1999)). The *Liang* court analyzed 8 U.S.C. § 1252(a)(2)(c) and (b)(9) and found that there was nothing in these sections which evinced a congressional intent to divest the district courts of habeas jurisdiction. "None of the provisions, including INA § 242(b)(9), expressly refers to habeas jurisdiction or to 28 U.S.C. § 2241. None expressly revokes habeas jurisdiction." *Liang*, 2000 WL *8. The court followed its decision in *Sandoval*, finding that nothing in the permanent IIRIRA's rules changes the lack of specific reference to 28 U.S.C. § 2241 in the transitional rules. For these reasons, this Court finds that it does have jurisdiction over Mr. Rodriguez' petition for a writ of habeas corpus. The passage of the recent statutes in this area have not affected this court's habeas corpus jurisdiction.

Now that jurisdiction is established, this Court must delve into the merits of Mr. Rodriguez' claim. Mr. Rodriguez bases his petition on INA § 212(c), 8 U.S.C. § 1182(c), which was repealed effective April 1, 1997 by IIRIRA § 304(b), and was replaced by INA § 240A. The original § 212(c) provided for discretionary authority on the part of the Attorney General or her delegates, such as the BIA, to waive the deportation of an alien because of extraordinary hardship to the deportee or his family, or other exceptional circumstances.

The statute which replaced § 212(c), § 240A, states:

> (1) In general. The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien—
>
> * * *
>
> (C) has not been convicted of an offense under section 212(a)(2), 237(a)(2), or 237(a)(3) [8 USCS § 1182(a)(2), 1227(a)(2), or 1227(a)(3)]; . . .

8 U.S.C. § 1229(b)(1)(C). The new statute therefore removes the discretion of the Attorney General for aliens, like Mr. Rodriguez who have been convicted of an offense under § 237(a)(2)(iii) for an aggravated felony.

Because Mr. Rodriguez had been convicted of an aggravated felony under the INA, the BIA affirmed the decision of the IJ that he was statutorily ineligible for such relief. Mr. Rodriguez challenges this decision on the basis that IIRIRA § 304(b) cannot apply retroactively to convictions that occurred before the date of the section.

DeSousa states that "five months after the passage of AEDPA, Congress repealed § 212(c) in its entirety,

effective April, 1, 1997. *See* IIRIRA § 304(b). Because *DeSousa*'s deportation proceedings were initiated in 1996, this repeal does not affect his case." *DeSousa v. Reno*, 190 F.3d 175, 179 n.4 (3d Cir. 1999). Therefore, *DeSousa* states that deportation proceedings initiated after April 1, 1997 were governed by the new statute. In *Sandoval*, the court states: ". . . we conclude that AEDPA does contain an expression of congressional intent and that Congress's intent was that the AEDPA amendment to § 212(c) was not to be applied to pending cases." *Sandoval*, 166 F.3d at 240. However, *Sandoval* also holds that "Because the INA initiated removal proceedings against Sandoval before April 1, 1997, the repeal of § 1182(c) does not apply here." (*Id.* at 239). Therefore, both *DeSousa* and *Sandoval* hold that deportation proceedings initiated after April 1, 1997 would be governed by the new rule eliminating discretion on the part of the Attorney General.

The only issue now to be decided by this Court is whether the deportation proceedings against Mr. Rodriguez were initiated before April 1, 1997. This Court finds that they were not. It is clear that Mr. Rodriguez' convictions occurred prior to the date upon which the AEDPA became effective. In addition, the INS issued a detainer on him on May 9, 1994, before the AEDPA became effective. Therefore, Mr. Rodriguez argues that it is inequitable to apply the new AEDPA rules to him, since the only reason that his case was "initiated" after April 1, 1997 was that the INS waited for several years before filing the NTA on May 23, 1997. Mr. Rodriguez claims that this action by the INS was not only inequitable, but that the INS violated its regulations by bringing an NTA after Mr. Rodriguez had been released from custody.

However, in this case, the removal proceedings were initiated on May 23, 1997, after the amendment came

into effect. The reason that the case was not initiated until May 23, 1997, is that the case is "initiated" when the NTA is filed with the Court.[1] 8 C.F.R. § 3.14(a) states that "Jurisdiction vests, and proceedings before an Immigration Judge commenced, when a charging document is filed with the Immigration Court by the Service." The first document filed with the Court is the NTA. In addition, 8 C.F.R. § 239.1 states that "Every removal proceeding conducted under section 240 of the Act to determine the deportability or inadmissibility of an alien is commenced by the filing of a notice to appear with the Immigration Court." In this case, the Notice to Appear was filed with the Court on May 23, 1997. In addition, the Third Circuit in *Liang* held that, in the context of the jurisdiction question, "deportation proceedings were not initiated against any of the petitioners until after April 1, 1997." *Liang*, 2000 WL at *7. That is the date that the case was initiated; therefore, the amended statute which became effective on April 1, 1997 is controlling.

Mr. Rodriguez relies upon *Wallace v. Reno*, a First Circuit case where the court found that ". . . we think that when an order to show cause is served on the alien, the deportation process has effectively begun and expectations properly form, even if there is no actual reliance." *Wallace v. Reno*, 194 F.3d 279, 287 (1st Cir. 1999); *accord McKenzie v. Reno*, No. 97-11285-DPW at 4 n.3 (D. Mass. Dec. 10, 1998); *Mercado-Amador v. Reno*, 47 F. Supp. 2d 1219, 1224 (D. Or. 1999); *Canela*

---

[1] In its Opinion, the Third Circuit stated that the removal proceedings were "initiated" on July 1, 1997 (2000 WL 264216 at *2). This is the date of service of the NTA upon Mr. Rodriguez and the date on which he executed his request for a prompt hearing. (*See* Certification of Laura M. Smith, Exh. A). Any distinction between the dates of May 23 and July 1, 1997 is, however, immaterial in the case at bar where both are after April 1, 1997.

v. U.S. Dep't of Justice, 64 F. Supp. 2d 456 (E.D. Pa. 1999). In Canela, District Judge Katz, in the Eastern District of Pennsylvania, analyzed "whether an alien who was issued an OSC prior to the date of AEDPA's enactment should be barred from applying for discretionary relief because the INS failed to file that same OSC with the immigration court until after AEDPA's enactment." 64 F. Supp. 2d at 457. The court found that "The date at which the regulations consider a case to have commenced is essentially random." (*Id.*, citing *Wallace*, 24 F. Supp. 23d at 113).

> Had the INS completed the administrative task of filing the OSC with the IJ promptly, Mr. Canela may well have been eligible for 212(c) relief even under the agency interpretation. Consequently, the court accepts the reasoning of another district court faced with a similar issue:
>
> > "I am not persuaded by the defendants' argument that [petitioner] was not in deportation proceedings until the order to show cause was filed in immigration court. As of the time the order to show cause was issued, the INS had the power to arrest him; commencement of the case in immigration court was subject only to the vagaries of administrative scheduling. From a due process standpoint, [petitioner] was subject to the deportation power of the INS as of the time the show cause order issued; fairness requires that the INS, having placed [petitioner] under its authority, should also live with the results of that decision."

Canela,64 F. Supp. 2d at 458 (citing *Mercado-Amador v. Reno*, 47 F. Supp. 2d 1219, 1224 (D. Or. 1999)). Therefore, the *Canela* court found that the petitioner's case

was pending as of the date he received the order to show cause.

In the instant case, an order to show cause was never filed on Mr. Rodriguez. A detainer was filed, but that document does not have the effect which an order to show cause has. As stated in *Canela*, "As of the time the order to show cause was issued, the INS had the power to arrest him." A detainer, on the other hand, "merely notifies prison officials that a decision regarding [a prisoner's] deportation will be made by the INS at some future date." *Roldan v. Racette*, 984 F.2d 85, 88 (2d Cir. 1993) (citing *Orozco v. INS*, 911 F.2d 539, 540-41 (11th Cir. 1990). Courts have held that the issuance of a detainer does not mean that the alien is considered to be in the custody of the INS. *See Lepez-Mejia v. U.S. Immigration and Naturalization Service, et al.*, 798 F. Supp. 625, 627 (C.D. Cal. 1992). The detainer is a "request that such agency advise the Service, prior to release of the alien, in order for the Service to arrange to assume custody, in situations when gaining immediate physical custody is either impracticable or impossible." 8 C.F.R. § 287.7. The detainer, as merely notice to another law enforcement agency, does not initiate the proceedings with the INS. Therefore, the petitioner's case was "initiated" when the Notice to Appear was filed with the court on May 23, 1997. For that reason, the petitioner is not eligible for relief under former § 212(c). The respondents' motion to dismiss petitioner's habeas corpus petition is therefore granted.

CONCLUSION

Respondents' motion to dismiss is granted. The petitioner's habeas corpus petition is dismissed in its entirety.

/s/ JOHN W. BISSELL
JOHN W. BISSELL
United States District Judge

Dated: May 31, 2000

Appendix G

UNITED STATES COURT OF APPEALS
DISTRICT OF NEW JERSEY

Civil Action No. 99-4300(JWB)

CARMELO JOSE RODRIGUEZ,

Petitioner/Plaintiff,

v.

JANET RENO, Attorney General of the United States; DORIS MEISSNER, Commissioner of the Immigration & Naturalization Service; ANDREA QUARANTILLO, District Director, Immigration and Naturalization Service; IMMIGRATION AND NATURALIZATION SERVICE; and the DEPARTMENT OF JUSTICE,

Defendants/Respondents.

ORDER

For the reasons set forth in the Court's Opinion filed herewith,

It is on this 31st day of May, 2000,

ORDERED that the respondents' motion to dismiss is granted, and the petition of Carmelo Jose Rodriguez for the issuance of a writ of habeas corpus be, and it hereby is, dismissed in its entirety.

/s/ JOHN W. BISSELL

JOHN W. BISSELL
United States District Judge

Appendix H

1. The Suspension of Habeas Corpus Clause of the United States Constitution, Art. 1, § 9, C1.2, provides:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

2. U.S. Constitution, Art. III provides in pertinent part:

> Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish . . . .
>
> Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, . . . to Controversies to which the United States shall be a Party; . . . .

3. U.S. Constitution, Amendment V provides in pertinent part:

> No person shall be . . . deprived of life, liberty, or property without due process of law. . . .

4. Prior to April 24, 1996, section 106(a) of the Immigration and Nationality Act, 8 U.S.C. 1105a(a) (1994), provided in pertinent part:

> **Exclusiveness of procedure**
>
> The procedure prescribed by, and all the provisions of chapter 158 of title 28, shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation, heretofore or hereafter made against aliens within

the United States pursuant to administrative proceedings under section 1252(b) of this title or pursuant to section 1252a of this title or comparable provisions of any prior Act, except that—

* * * * *

(10) Habeas corpus

any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings.

5. After April 24, 1996, and before September 30, 1996, Section 106(a) of the Immigration and Nationality Act, 8 U.S.C. 1105a(a) (to be codified), provided in pertinent part:

Exclusiveness of procedure

The procedure prescribed by, and all the provisions of chapter 158 of title 28, shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation, heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title or pursuant to section 1252a of this title or comparable provisions of any prior Act, except that—

* * * * *

(10) Any final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered by section [1251](a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section [1251](a)(2)(A)(ii) for which both predicate offenses are covered by section

[1251](a)(2)(A)(i), shall not be subject to review by any court.

6. Prior to April 24, 1996, Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c) (1994), provided:

Nonapplicability of subsection (a)

Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) of this section (other than paragraphs (3) and (9)(C). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title. The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years.

7. Effective April 24, 1996,[1] Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c) (to be codified), provided:

---

[1] Section 212(c) was amended by Section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1277, on April 24, 1996. Further technical amendments were made by Section 306(d) of the Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-612, on September 30, 1996, and those technical amendments were made effective as if they were enacted on the original enactment date of AEDPA. See p. 68a, *infra*. The version set forth in the text reflects both sets of amendments. In addition, Sec-

Nonapplicability of subsection (a)

Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) of this section (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title. This subsection shall not apply to an alien who is deportable by reason of having committed any criminal offense covered by section [1251](a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section [1251](a)(2)(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section [1251](a)(2)(A)(i).

8. Section 242 of the Immigration and Nationality Act, 8 U.S.C. 1252 (Supp. II 1996), provides in pertinent part:

(a) Applicable provisions

(1) General orders of removal

Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of title 28, except as provided in

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tion 304(b) of IIRIRA, 110 Stat. 3009-597, repealed Section 212(c) entirely, but Sections 306 and 309 of IIRIRA, 110 Stat. 3009-607, 3009-625, make clear that this repeal applies only to aliens placed in removal proceedings on or after April 1, 1997. See pp. 67a-70a, *infra*.

subsection (b) of this section and except that the court may not order the taking of additional evidence under section 2347(c) of such title.

* * * * *

(2)(C) Orders against criminal aliens

Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 212(a)(2) or 237(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 237(a)(2)(A)(ii) for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 237(a)(2)(A)(i).

* * * * *

(b)(9) Consolidation of questions for judicial review

Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this title shall be available only in Judicial review of a final order under this section.

* * * * *

(g) Exclusive jurisdiction

Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or

execute removal orders against any alien under this chapter.

9. Section 401(e) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1268 (Apr. 24, 1996), provides:

> ELIMINATION OF CUSTODY REVIEW BY HABEAS CORPUS.—Section 106(a) of the Immigration and Nationality Act (8 U.S.C. 1105a(a)) is amended—
>
> (1) in paragraph (8), by adding "and" at the end;
>
> (2) in paragraph (9), by striking "; and" at the end and inserting a period; and
>
> (3) by striking paragraph (10).

10. Section 440 of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1276 (Apr. 24, 1996), as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (Sept. 30, 1996),[2] provides in pertinent part:

CRIMINAL ALIEN REMOVAL.

(a) JUDICIAL REVIEW.—Section 106 of the Immigration and Nationality Act (8 U.S.C. 1105a(a)(10)) is amended to read as follows:

> "(10) Any final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered in section 241(a)-(2)(A)(iii), (B), (C), or (D), or any offense covered

---

[2] Section 306(d) of IIRIRA, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-612, made certain technical amendments to Section 440 of AEDPA, Pub. L. No. 104-132, 110 Stat. 1276, effective as if included in the original enactment of AEDPA. See p. 68a, *infra*.

by section 241(a)(2)(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 241(a)-(2)(A)(i), shall not be subject to review by any court."

* * * * *

(d) CLASSES OF EXCLUDABLE ALIENS.—Section 212(c) of such Act (8 U.S.C. 1182(c)) is amended—

(1) by striking "The first sentence of this" and inserting "This"; and

(2) by striking "has been convicted of one or more aggravated felonies" and all that follows through the end and inserting "is deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 241(a)(2)(A)(i)."

11. Section 304(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-597 (Sept. 30, 1996) provides:

REPEAL OF SECTION 212(c).—Section 212(c) (8 U.S.C. 1182(c)) is repealed.

12. Section 306 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-607 (Sept. 30, 1996), as amended by Pub. L. No. 104-302, 110 Stat. 3656 (Oct. 11 1996),[3] provides in pertinent part:

---

[3] Public Law No. 104-302, 110 Stat. 3656 (Oct. 11, 1996) made certain technical amendments to Sections 306 and 309 of

APPEALS FROM ORDERS OF REMOVAL (NEW SECTION 242).

* * * * *

(b) REPEAL OF SECTION 106.—Section 106 (8 U.S.C. 110(a) is repealed.

(c) EFFECTIVE DATE.—

(1) IN GENERAL.—Subject to paragraph (2), the amendments made by subsections (a) and (b) shall apply as provided under section 309, except that subsection (g) of section 242 of the Immigration and Nationality Act (as added by subsection (a)), shall apply without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings under such Act.

* * * * *

(d) TECHNICAL AMENDMENT.—Effective as if included in the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (Public Law 104-132), subsections (a), (c), (d), (g), and (h) of section 440 of such Act are amended by striking "any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are covered by section 241(a)(2)(A)(i)" and inserting "any offense covered by section 241(a)(2)-(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 241(a)(2)(A)(i).

13. Section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-625 (Sept. 30, 1996), as amended by Pub. L. No. 104-302, 110 Stat. 3656 (Oct. 11, 1996), provides in pertinent part:

IIRIRA, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-607, 3009-625, effective as if enacted on the original date of enactment of IIRIRA.

EFFECTIVE DATES; TRANSITION.

(a) IN GENERAL.—Except as provided in this section and sections 303(b)(2), 306(c), 308(d)(2)(D), or 308(d)(5) of this division, this subtitle and the amendments made by this subtitle shall take effect on the first day of the first month beginning more than 180 days after the date of the enactment of this Act (in this title referred to as the "title III-A effective date").

* * * * *

(c) TRANSITION FOR ALIENS IN PROCEEDINGS.

(1) GENERAL RULE THAT NEW RULES DO NOT APPLY.—Subject to the succeeding provisions of this subsection, in the case of an alien who is in exclusion or deportation proceedings before the title III-A effective date—

(A) the amendments made by this subtitle shall not apply, and

(B) the proceedings (including judicial review thereof) shall continue to be conducted without regard to such amendments.

* * * * *

(4) TRANSITIONAL CHANGES IN JUDICIAL REVIEW.—In the case in which a final order of exclusion or deportation is entered more than 30 days after the date of the enactment of this Act, notwithstanding any provision of section 106 of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act) to the contrary—

* * * * *

(G) there shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having committed a criminal offense covered in section

212(a)(2) or section 241(a)(2)(A)(iii), (B), (C), or (D) of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act), or any offense covered by section 241(a)(2)(A)(ii) of such Act (as in effect on such date) for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 241(a)(2)(A)(i) of such Act (as so in effect).

14. Section 2241 of Title 28, United States Code, provides in pertinent part:

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

* * * * *

(c) The writ of habeas corpus shall not extend to a prisoner unless

* * * * *

(3) He is in custody in violation of the Constitution or laws or treaties of the United States[.]

Supreme Court, U.S.
FILED
DEC 13 2000
OFFICE OF THE CLERK

No. 00-753

In the Supreme Court of the United States

CARMELO JOSE RODRIGUEZ, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT

SETH P. WAXMAN
Solicitor General
Counsel of Record
DAVID W. OGDEN
Assistant Attorney General
DONALD E. KEENER
LISA M. ARNOLD
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Department of Justice
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QUESTION PRESENTED

Whether the court of appeals correctly concluded that, under 8 U.S.C. 1252(a)(2)(C) (Supp. V 1999), it lacked jurisdiction on direct petition for review over petitioner's challenge to his final removal order, but that the district court had habeas corpus jurisdiction to entertain that challenge under 28 U.S.C. 2241.

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In the Supreme Court of the United States

No. 00-753

CARMELO JOSE RODRIGUEZ, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-33a) is reported at 206 F.3d 308. The decisions of the Board of Immigration Appeals (Pet. App. 40a-42a) and the immigration judge (Pet. App. 37a-39a) are unreported. The decision of the district court on habeas corpus proceedings, rejecting petitioner's claim on the merits (Pet. App. 46a-58a), is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 9, 2000. A petition for rehearing was denied on June 9, 2000 (Pet. App. 43a-45a). On August 29, 2000, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including October 7, 2000. On September 27, 2000, Justice Souter further

extended the time within which to file a petition for a writ of certiorari to and including November 6, 2000, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves amendments to the Immigration and Nationality Act (INA) enacted by Congress in 1996. Those changes were designed in large part to reduce the opportunities for criminal aliens to obtain administrative relief from deportation, and to facilitate their removal from the United States by restricting and streamlining the process of judicial review of their deportation orders. Two enactments by Congress are particularly pertinent: the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (enacted Apr. 24, 1996); and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (enacted Sept. 30, 1996).

a. An alien is deportable from the United States if he has been convicted at any time after his admission of two or more crimes involving moral turpitude not arising out a single scheme of criminal misconduct (see 8 U.S.C. 1227(a)(2)(A)(ii) (Supp. V 1999)), if he has been convicted of an "aggravated felony," as that term is defined in the INA (see 8 U.S.C. 1227(a)(2)(A)(iii) (Supp. V 1999); 8 U.S.C. 1101(a)(43)(G) (1994 & Supp. V 1999)), or if he has been convicted of an offense involving controlled substances (see 8 U.S.C. 1227(a)(2)(B)(i) (Supp. V 1999)). Before the enactment of AEDPA, an alien lawfully admitted for permanent residence who was subject to deportation because of a criminal conviction could apply to the Attorney General for discretionary relief from deportation under 8 U.S.C.

1182(c) (1994). To be eligible for such relief, the alien had to show, among other things, that he had had a lawful unrelinquished domicile in this country for seven years, and that, if his conviction was for an aggravated felony, he had not served a term of imprisonment of five years or more. See 8 U.S.C. 1182(c) (1994).

If the Attorney General denied relief from deportation under Section 1182(c), then the alien could challenge that denial of relief by filing a petition for review of his deportation order in the court of appeals. See 8 U.S.C. 1105a(a) (1994) (incorporating Hobbs Administrative Orders Review Act (Hobbs Act), 28 U.S.C. 2341-2351 (1994 & Supp. IV 1998)). Under certain circumstances an alien in custody pursuant to an order of deportation could seek judicial review thereof by filing a petition for a writ of habeas corpus in district court, pursuant to 8 U.S.C. 1105a(a)(10) (1994).

b. In 1996, Congress twice restricted both the substantive eligibility of criminal aliens for discretionary relief from deportation and the availability of judicial review of criminal aliens' deportation orders. First, on April 24, 1996, Congress enacted AEDPA into law. Section 440(d) of AEDPA amended Section 1182(c) to make certain classes of criminal aliens categorically ineligible for discretionary relief from deportation under that Section, including aliens convicted of two unrelated crimes involving moral turpitude, aggravated felonies, and controlled substance offenses. See AEDPA § 440(d), 110 Stat. 1277 (referring toaliens deportable under 8 U.S.C. 1251(a)(2)(A)(ii), 1251(a)(2)(A)(iii), and 1251(a)(2)(B) (1994) (now recodified as 8 U.S.C. 1227(a)(2)(A)(ii), 1227(a)(2)(A)(iii), and 1227(a)(2)(B) (Supp. V 1999)).

Section 440(a) of AEDPA enacted a related exception to the general availability of judicial review of deporta-

tion orders in the courts of appeals for the same classes of aliens. Section 440(a) provided that any final order of deportation against an alien who was deportable for having committed one of the disqualifying offenses enumerated in Section 440(d) "shall not be subject to review by any court." AEDPA § 440(a), 110 Stat. 1276-1277. At the same time, Section 401(e) of AEDPA, entitled "ELIMINATION OF CUSTODY REVIEW BY HABEAS CORPUS," repealed the previous version of 8 U.S.C. 1105a(a)(10) (1994), which had specifically permitted aliens in custody pursuant to an order of deportation to seek habeas corpus relief in district court. See AEDPA § 401(e), 110 Stat. 1268.

c. On September 30, 1996, Congress enacted IIRIRA into law. In Section 304 of IIRIRA, Congress abolished the old distinction between "deportation" and "exclusion" orders, and instituted a new form of proceeding, known as "removal." See 8 U.S.C. 1229, 1229a (Supp. V 1999); IIRIRA § 304, 110 Stat. 3009-587 to 3009-593. Section 304 of IIRIRA also refashioned the terms on which an alien found to be subject to removal may apply for relief in the discretion of the Attorney General. Congress completely repealed old Section 1182(c). See IIRIRA § 304(b), 110 Stat. 3009-597 ("Section 212(c) (8 U.S.C. 1182(c)) is repealed."). In its stead, Congress created a new form of discretionary relief, known as cancellation of removal, with new eligibility terms. See 8 U.S.C. 1229b (Supp. V 1999); IIRIRA § 304(a)(3), 110 Stat. 3009-594. An alien convicted of any aggravated felony is ineligible for discretionary cancellation of removal. See 8 U.S.C. 1229b(a)(3) (Supp. V 1999).

Because IIRIRA made sweeping changes to the system for removal of aliens, Congress delayed IIRIRA's full effective date and established various transition

rules. As a general matter, Congress provided that most of IIRIRA's provisions, including the new removal procedures, the new provisions for cancellation of removal, and the repeal of Section 1182(c)—all of which were enacted together in Section 304 of IIRIRA —would take effect on April 1, 1997. See IIRIRA § 309(a), 110 Stat. 3009-625. For aliens who were placed in deportation or exclusion proceedings before that date, Congress provided that most of IIRIRA's amendments would not apply, and that such cases instead would generally be governed by pre-IIRIRA law, including AEDPA, along with transitional rules further restricting judicial review of criminal aliens' deportation orders. See IIRIRA § 309(c), 110 Stat. 3009-625 to 3009-627, as amended by Act of Oct. 11, 1996, Pub. L. No. 104-302, § 2, 110 Stat. 3657 (technical corrections).

Congress also recast and streamlined the INA's provisions for judicial review of removal orders, in Section 306 of IIRIRA. For removal proceedings commenced after April 1, 1997, Congress repealed altogether the former judicial-review provisions of 8 U.S.C. 1105a (1994), which, before AEDPA, had (at subsection (a)(10)) expressly made the writ of habeas corpus available to aliens held in custody. IIRIRA § 306(b), 110 Stat. 3009-612. Congress replaced those judicial review provisions with the new 8 U.S.C. 1252 (Supp. V 1999), which reestablished the traditional rule that final orders of removal are subject to judicial review only on petition for review in the courts of appeals. See 8 U.S.C. 1252(a)(1) (Supp. V 1999) (incorporating Hobbs Act). Congress also restricted judicial review of removal orders entered against criminal aliens by providing that, "[n]otwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is

removable by reason of having committed" various criminal offenses, including aggravated felonies, controlled substance offenses, and two unrelated crimes involving moral turpitude. See 8 U.S.C. 1252(a)(2)(C) (Supp. V 1999). And Congress enacted a new, sweeping jurisdiction-limiting provision, 8 U.S.C. 1252(b)(9) (Supp. V 1999), which provides:

> Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section [*i.e.*, Section 1252].

2. Petitioner is a native and citizen of the Dominican Republic who was admitted to the United States as a lawful permanent resident alien on December 20, 1983. Certified Administrative Record (C.A.R.) 17. On February 19, 1993, petitioner pleaded guilty in New Jersey state court to possession of a controlled substance (cocaine) and receiving stolen property, and was sentenced to four years' imprisonment. C.A.R. 69, 82-83. On March 28, 1994, he pleaded guilty in Ohio state court to receiving stolen property, and was sentenced to six months' imprisonment. C.A.R. 75-81.

On July 1, 1997, after the general effective date of IIRIRA, petitioner was served with a Notice to Appear which charged him with removability based on those convictions. The Notice charged that petitioner had been convicted of two unrelated crimes involving moral turpitude (the two convictions for receiving stolen property), an aggravated felony (the New Jersey con-

viction for receiving stolen property),[1] and a controlled substance offense. At his removal hearing before an immigration judge (IJ), petitioner admitted the allegations in the Notice to Appear, and conceded his removability as charged. Petitioner sought, however, to apply for discretionary relief from deportation under former 8 U.S.C. 1182(c) (1994), which had been repealed by IIRIRA. The immigration judge ruled that petitioner was ineligible for relief under Section 1182(c), and ordered him deported to the Dominican Republic. C.A.R. 54-55.

The Board of Immigration Appeals (BIA) dismissed petitioner's appeal. Pet. App. 41a-42a. The BIA concluded that relief under former Section 1182(c) was not available to petitioner because he was placed in removal proceedings after IIRIRA's effective date, when Section 1182(c) was repealed. The BIA also ruled that petitioner was ineligible for cancellation of removal because of his conviction for an aggravated felony. *Id.* at 42a.

3. Petitioner filed a petition for review of his final removal order in the court of appeals. Petitioner did not contest that he was an alien who was removable as a result of his criminal convictions. Rather, he argued that the BIA erred in concluding that he was ineligible for relief under former Section 1182(c), and that IIRIRA's repeal of that provision should not be applied

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[1] The definition of "aggravated felony" in the INA includes "a theft offense (including receipt of stolen property) * * * for which the term of imprisonment [is] at least one year." 8 U.S.C. 1101(a)(43)(G) (1994 & Supp. V 1999). Petitioner was sentenced to four years' imprisonment for the New Jersey offense of receiving stolen property. C.A.R. 69.

to his case, which involved a criminal conviction entered before IIRIRA became effective. Pet. C.A. Br. 26-59.

The government moved to dismiss the petition for review for lack of jurisdiction, contending that, under Section 1252(a)(2)(C), the court of appeals was precluded from reviewing the claim raised by petitioner, who was convicted of offenses enumerated in that Section. Gov't C.A. Br. 3-4. The government also argued (*id.* at 11-15) that the district court also would not have authority to entertain petitioner's challenge to his final removal order under its habeas corpus jurisdiction provided by 28 U.S.C. 2241. The government argued that the court of appeals' earlier decision in *Sandoval* v. *Reno*, 166 F.3d 225 (3d Cir. 1999), which had held that district courts retained their authority after AEDPA to entertain criminal aliens' challenges to their final deportation orders, was distinguishable because that case involved only AEDPA and the transitional judicial-review provisions of IIRIRA, and not the permanent provisions of IIRIRA.

The court of appeals dismissed the petition for review for lack of jurisdiction, but also held that the district court (in which petitioner filed a petition for a writ of habeas corpus, see p. 10, *infra*), could entertain at least some of petitioner's challenges to his removal order under 28 U.S.C. 2241. Pet. App. 1a-33a. Closely following its earlier decision in *Sandoval* (see *id.* at 20a-22a), the court concluded that Congress had not, in IIRIRA, expressly repealed the district court's authority to entertain challenges to removal orders under 28 U.S.C. 2241. The court stressed that "a repeal of habeas jurisdiction will not be found by implication" (Pet. App. 20a), and that such a repeal "can only be effected by express congressional command" (*id.* at 21a). Nor did the court find its decision in *Sandoval*

undermined by either the permanent rules of IIRIRA, including Section 1252(b)(9)—which, it concluded, does not "expressly revoke[] habeas jurisdiction" (*id.* at 20a) —or this Court's intervening decision in *Reno* v. *American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 482 (1999), which described Section 1252(b)(9) as an "unmistakable 'zipper' clause" channeling review of all issues arising out of removal orders into the courts of appeals on direct review. Although the court agreed with the government that Section 1252(b)(9) "clearly expresses congressional intent that judicial review of questions arising from a proceeding brought to remove an alien be conducted under the INA in the courts of appeals," it did not agree that that Section "clearly expresses congressional intent that the district courts be divested of their habeas jurisdiction under § 2241." Pet. App. 24a.

The court also observed that its decision in *Sandoval* was predicated heavily on concerns that an unconstitutional suspension of habeas corpus would arise if criminal aliens such as petitioner were not able to invoke the district court's jurisdiction under 28 U.S.C. 2241 to challenge the merits of their removal orders. Pet. App. 28a-29a. The government had argued that the Constitution did not require a judicial forum for the particular claims raised by petitioner in this case, concerning eligibility for discretionary relief from deportation, and that on petition for review, the court of appeals could decide jurisdictional facts on which the statutory preclusion of review turned, including whether petitioner was an alien and whether he had in fact been convicted of an offense referred to in the categories enumerated in Section 1252(a)(2)(C). Gov't C.A. Br. 19-23. The government also suggested that, to the extent the Constitution did require a judicial forum

for petitioner's particular claims, it would be more consistent with congressional intent for that claim to be reviewed in the court of appeals on petition for direct review than in the district court on collateral challenge. See Pet. App. 30a. The court of appeals concluded, however, that Section 1252(a)(2)(C) broadly precluded it from reviewing the particular claims raised in this case by petitioner, and thus found this case no different from *Sandoval*. *Id.* at 29a-33a. The court noted, however, that "were the judges' preferences determinative, it is likely that many would opt for a system under which aliens' challenges to nondiscretionary immigration decisions, both statutory as well as constitutional, would be reviewed directly in the courts of appeals" rather than the district court on collateral challenge. *Id.* at 33a.

4. While his petition for review was pending in the court of appeals, petitioner filed a separate petition for a writ of habeas corpus in district court raising essentially the same challenges to his removal order. After the court of appeals' decision was issued, the district court ruled that it had habeas corpus jurisdiction under Section 2241 to consider petitioner's constitutional and statutory challenges to his removal order. Pet. App. 50a-52a. The district court also ruled, however, that the BIA had correctly concluded that petitioner was ineligible for relief under former Section 1182(c) because that provision was repealed when IIRIRA's permanent provisions went into effect, and it dismissed the habeas corpus petition on the merits. *Id.* at 53a-58a. Petitioner's appeal from that decision is still pending in the court of appeals. *Rodriguez* v. *Reno*, No. 00-2225 (3d Cir.).

DISCUSSION

Petitioner urges this Court to grant review to decide whether, after the comprehensive changes to the INA made by AEDPA and IIRIRA, a court of appeals on petition for review may entertain a claim such as that raised by petitioner in this case, notwithstanding the broad preclusion of review set forth in 8 U.S.C. 1252(a)(2)(C) (Supp. V 1999), and if not, whether the district courts retain authority under 28 U.S.C. 2241 to review a criminal alien's challenge to the merits of his final removal order. As petitioner points out, the courts of appeals have reached differing conclusions on those questions.

The Fifth Circuit, in *Max-George* v. *Reno*, 205 F.3d 194, 198-203 (2000), petition for cert. pending, No. 00-6280, and the Eleventh Circuit, in *Richardson* v. *Reno*, 180 F.3d 1311, 1318 (1999), cert. denied, 120 S. Ct. 1529 (2000), have ruled that Congress in IIRIRA has barred the district courts from entertaining a criminal alien's challenge to his final removal order. By contrast, in addition to the Third Circuit in the decision below, the First, Second, and Ninth Circuits have concluded that the district courts have such authority. See *Mahadeo* v. *Reno*, 226 F.3d 3, 7-14 (1st Cir. 2000) (holding that district court had habeas corpus jurisdiction under Section 2241 to consider retroactivity challenge), petition for cert. pending, No. 00-962; *St. Cyr* v. *INS*, 229 F.3d 406, 409-410 (2d Cir. 2000) (same), petition for cert. pending, No. 00-767; *Richards-Diaz* v. *Fasano*, No. 99-56530, 2000 WL 1715956 (9th Cir. Nov. 17, 2000) (same). The Second and Ninth Circuits have also held, in agreement with the court of appeals in this case, that Section 1252(a)(2)(C) broadly precludes the courts of appeals from entertaining challenges to final removal orders

raised by criminal aliens on direct petition for review, including challenges similar to that raised by petitioner in this case. See *Calcano-Martinez* v. *INS*, No. 98-4033, 2000 WL 1336611, at *9-*16 (2d Cir. Sept. 1, 2000) (holding that, under Section 1252(a)(2)(C), court of appeals lacked jurisdiction on direct petition for review to entertain similar retroactivity claim, but that district court had jurisdiction to entertain that claim on habeas corpus); *Flores-Miramontes* v. *INS*, 212 F.3d 1133, 1135-1136, 1141-1143 (9th Cir. 2000) (holding that, under Section 1252(a)(2)(C), court of appeals lacked jurisdiction to entertain aggravated felon's contention that his removal proceedings violated procedural due process, but that district court could entertain that claim on habeas corpus).

Because of that conflict in the circuits, as well as the importance of the issue to the administration of the INA, we have filed a petition for a writ of certiorari in *St. Cyr* seeking review of the Second Circuit's decision upholding the district court's assertion of jurisdiction under Section 2241 in that case.[2] In our view, *St. Cyr* is a better vehicle than this case for resolution of that jurisdictional issue. The government's petition in *St. Cyr* also seeks review of the Second Circuit's decision agreeing with the alien's challenge to the merits of the removal order in that case, which independently warrants plenary review in the event that the Court concludes in that case that jurisdiction in that case was proper under 28 U.S.C. 2241. See 00-767 (*St. Cyr*) Pet.

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[2] We are providing petitioner with a copy of our petition in *St. Cyr*. Related jurisdictional issues are also presented by the petitions in *Zalawadia* v. *Reno*, No. 00-268; *Obajuluwa* v. *Reno*, 00-523; *Reno* v. *Mahadeo*, No. 00-962; *Russell* v. *Reno*, No. 00-5970; and *Max-George* v. *Reno*, No. 00-6280.

at 26-30. This case, however, presents only the issue of jurisdiction, because the court of appeals held that it lacked jurisdiction over petitioner's petition for review and thus did not adjudicate the merits of petitioner's challenge to his removal order.

Petitioner points out (Pet. 8-9) that *St. Cyr* arises in a case in which the alien invoked the district court's habeas corpus jurisdiction, whereas this case arises on an alien's direct petition for review in the court of appeals. Petitioner does not disagree that the petition in *St. Cyr* warrants this Court's review, but he suggests that the Court should also grant review in this case, so that the Court may consider the jurisdictional issues raised by AEDPA and IIRIRA with both a habeas corpus case and a petition for review case before it. Petitioner observes (and we agree) that the Court will likely construe the preclusion-of-review provisions in IIRIRA in determining whether the district courts may exercise habeas corpus jurisdiction.

Although the Court could grant certiorari in this case as well as in *St. Cyr*, in our view it is not necessary for the Court to grant review in both cases. Every court of appeals that has considered the jurisdictional issues raised by AEDPA and IIRIRA has recognized that the scope of the court of appeals' jurisdiction on petition for review and the scope of the district court's habeas corpus jurisdiction after AEDPA and IIRIRA are closely intertwined issues. Indeed, the central basis for the court of appeals' decision in *St. Cyr* that jurisdiction was proper under 28 U.S.C. 2241 was its conclusion, based on its decision issued the same day in *Calcano*, *supra*, that under Section 1252(a)(2)(C) it lacked jurisdiction to entertain the same claim on direct petition for review. See *St. Cyr*, 229 F.3d at 409-410. Thus, if the Court grants certiorari in *St. Cyr*, when the Court

determines whether the lower courts properly exercised habeas corpus jurisdiction in that case, it almost surely will review the Second Circuit's conclusion that it could not have entertained the same claim on petition for review. Accordingly, we suggest that the Court hold the petition in this case for its disposition of *St. Cyr*.

CONCLUSION

The petition for a writ of certiorari should be held pending the disposition of the petition for a writ of certiorari in *INS* v. *St. Cyr*, No. 00-767, and then disposed of as appropriate in light the Court's action in that case.

Respectfully submitted.

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DECEMBER 2000